may justify granting rights to children over and above those which adults have" to ensure that they could in fact exercise the right even in their capacities are less than adults.[196] It is not only compatible but also necessary to recognize that, in many respects, "children are different" from adults and that "[m]any of them have lesser abilities and capabilities."[197] There are many barriers that stand in the way of children exercising their rights and having access to remedies. This includes "the financial burden of seeking legal advice, intimidating courtrooms and labyrinthine legal procedures [that] . . . can render access to justice for children a fiction."[198] Taking rights seriously[199] for children may require providing access to legal resources to children, such as "free legal aid for children outside the criminal justice system" so that they too may access legal representation.[200] This is of course a huge undertaking that "calls for creative solutions with regards to legal assistance.[201] But, it is a worthy one. Scholars should also think about how children receive legal information and seek to make it more accessible.[202]

I argue further that Children and the Law scholars should be particularly concerned about the developmental implications of denying children process and the means by which to vindicate their rights. Research suggests that when children are denied opportunities to be

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[196] *Id.* at 364
[197] *Id.* at 367-68.
[198] CHILD RIGHTS INT'L NETWORK, RIGHTS, REMEDIES & REPRESENTATION: GLOBAL REPORT ON ACCESS TO JUSTICE FOR CHILDREN 29 (2016), https://archive.crin.org/sites/default/files/crin_a2j_global_report_final_1.pdf; *see* Liefaard, *supra* note 181, at 203.
[199] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).
[200] Liefaard, *supra* note 181, at 208-09 ("[C]hildren are strongly in need of legal and other appropriate assistance in order to enjoy their right to access justice and such assistance should be free of charge (or subsidized) and effective."). For a discussion of legal aid for children, see THOMAS F. GERAGHTY & DIANE GERAGHTY, UNICEF, UNDP & UNDOC, CHILD-FRIENDLY LEGAL AID IN AFRICA (2011), https://www.unodc.org/pdf/criminal_justice/Child-Friendly_Legal_Aid_in_Africa.pdf.
[201] Liefaard, *supra* note 181, at 209. For an example of a creative solution, see *About Us*, YOUTH L. AUSTRL., https://yla.org.au/about-us/ (describing "Australia's only national, technology-based community legal service" that "provide[s] free and confidential legal advice, assistance and referrals to young people).
[202] *See* Liefaard, *supra* note 181, at 267.

beard and participate in the legal process, they "suffer identity-prejudicial credibility deficit" and "are wronged in their capacity as knowers."[203] The result is that children are "made to feel less human."[204] Michael D. Burroughs and Deborah Tollefsen argue that when "subjects are systematically denied a voice they can lose confidence in themselves and their own beliefs."[205] This naturally has developmental consequences that are only exacerbated by children's lack of access to legal actors and legal process. "Given the child's lack of social power and standing, she is rarely in a position to challenge these conceptions and the deficit model of childhood that provides them with support."[206] Research further "suggests that children (by the age of six) are as accurate as adults in recalling events and no more suggestible than adults when those memories are questioned in appropriate ways."[207] Such research suggests that children have something to offer the legal process, especially as it relates to their own experiences and lives. Even "very young children are also likely to have access to information that adults do not in a variety of domains."[208] Consistent with Developmental Jurisprudence, such developmental research has implications about the effect law has on child development. This research suggests that there are developmental harms in denying children an opportunity to be heard and present their perspectives, especially based on stereotypes. But this, together with the dignitary implications of having versus being deprived of rights, suggest that the field of Children and the Law, particularly in the United

[203] Michael D. Burroughs & Deborah Tollefsen, *Learning to Listen: Epistemic Injustice and the Child*, 13 EPISTEME 359, 363 (2016).
[204] *Id.*
[205] *Id.*
[206] *Id.* at 364.
[207] *Id.* at 366.
[208] *Id.* at 368 ("The fact that we do not rely on children to tell us about the stock market, for example, does not mean that we do not rely on them for a variety of other information, or that we shouldn't rely on them for a variety of other knowledge.").

States, ought to pay more attention to the children's access to the law and their ability to vindicate their rights to the extent they are able to.

Developmental science has a lot to offer and say about how to make those processes developmentally sensitive. The frameworks discussed above, with the exception of Developmental Jurisprudence, fail to address the law's *impact* on child development. But even Developmental Jurisprudence fails to take account of the developmental impact that rights in and of themselves have for all individuals, including children.

Conclusion

Developmental science has had a tremendous impact on the field of Children and the Law. Developmental science provides us with tools to evaluate and inform practices and policies to better support children and their interests. However, it is clear that the law is burdened with competing understandings of how it should relate to children. Developmental science can help, but as I've argued, legal actors must take the lead by identifying the values at stake and providing clear criteria for how developmental science is used. In addition, legal scholars should pay more attention to the role that rights play—understanding that they go the core of our legal system—and recognizing that there are developmental implications to be wrestled with when we as a society and a legal system either recognize or deprive individuals—including and especially children—of rights. When we do recognize such rights, it is necessary to see to it that these rights have the force of law and that children have access to justice such that they are capable of benefiting from the corresponding remedy. Recognizing children as human beings, I argue, requires recognizing them as rights holders. This ought to shift the conversation from debating whether or not children are deserving of rights, and the ability to vindicate rights, based on their developmental status, and towards

acknowledging that children do and using developmental science to inform process and remedies.

Applicant Details

First Name	**Dawson**
Middle Initial	**P**
Last Name	**Honey**
Citizenship Status	**U. S. Citizen**
Email Address	**dawsonhoney@gmail.com**
Address	**Address** Street **2850 Middlefield Rd. Apt 224** City **Palo Alto** State/Territory **California** Zip **94306** Country **United States**
Contact Phone Number	**2068199492**

Applicant Education

BA/BS From	**The College of Wooster**
Date of BA/BS	**May 2019**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 17, 2022**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Georgetown Journal of Legal Ethics**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Evan's Constitutional Law Competition 2021 (Quarterfinalist and Second Place Brief)** **Beaudry First Year Moot Court Competition (Semi-Finalist & Best Brief)**

Bar Admission

Admission(s) **California**

Prior Judicial Experience

Judicial Internships/ Externships **Yes**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Specialized Work Experience **Appellate, Bankruptcy, Prison Litigation**

Recommenders

Edelman, Peter
edelman@law.georgetown.edu
Hopwood, Shon
srh90@georgetown.edu
Sloan, Cliff
cliff.sloan@georgetown.edu

References

Anna Veross
Simpson Thacher & Bartlett
anna.veross@stblaw.com
(619) 453-4525

Ryan Snyder
Simpson Thacher & Bartlett
ryan.snyder@stblaw.com
(925) 787-5771

This applicant has certified that all data entered in this profile and any application documents are true and correct.

DAWSON P. HONEY

dawsonhoney@gmail.com • (206) 819-9492

Licensed to practice in California and admitted to the U.S. District Court for the Eastern District of California

Dear Judge Pitts:

I am a graduate of Georgetown University Law Center applying for a 2023 clerkship. I wanted to become a lawyer when I realized that it takes the constant intervention of good people to prevent rights from being infringed, so I am particularly interested in clerking for your chambers based on your strong commitment to protecting civil liberties. Since graduation in 2022, I have been practicing as a litigation associate at Simpson Thacher & Bartlett. In law school, I interned for the Honorable Reggie B. Walton and have been determined to clerk ever since. I was also a student attorney in the Housing Advocacy and Litigation Clinic, where I represented tenants facing eviction in landlord-tenant court. Participating in a clinic was a rewarding opportunity that gave me the chance to appear in court and achieve positive outcomes for people who might otherwise be forgotten.

Finding a solution to a new legal issue is an exciting fusion of creativity and reflection that gives me the feeling of solving a puzzle and writing a song at the same time. Though my dream career is in law, much of my background is in the arts. I have been a performing solo guitarist for nearly ten years and taught myself graphic design from a young age. Something that surprised me about legal thinking was how much I used the creative skills I gained from my arts experience when researching legal problems. Given the flexibility and uncertainty that permeates law, crafting an argument and writing it clearly follows the same paths of inspiration that I experience when writing music and creating graphics.

Enclosed are my resume, law transcript, and writing samples for your review. Letters of recommendation will be sent from the following:

Professor Peter Edelman
Georgetown University Law Center
edelman@law.georgetown.edu, (202) 662-9074

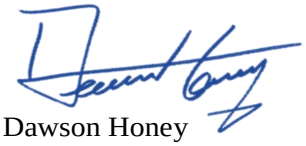
Professor Shon Hopwood
Georgetown University Law Center
srh90@georgetown.edu, (202) 662-9559

Professor Clifford Sloan
Georgetown University Law Center
Cliff.Sloan@georgetown.edu, (202) 371-7000

In addition, Anna Veross and Ryan Snyder, two associates at Simpson Thacher with whom I have worked closely, have agreed to serve as references based on my casework there. Ms. Veross may be reached at (619) 453-4525 and Mr. Snyder may be reached at (925) 787-5771.

Please let me know if there is any other information that would be helpful. Thank you for your consideration.

Respectfully,



Dawson Honey
dawsonhoney@gmail.com
(206) 819-9492

DAWSON P. HONEY

dawsonhoney@gmail.com • (206) 819-9492

Licensed to practice in California and admitted to the U.S. District Court for the Eastern District of California

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — Washington, DC
Juris Doctor — May 2022
GPA: 3.57

Journal: Senior Articles Editor: *Georgetown Journal of Legal Ethics*
Published Note: *A Patch with the Dev-il, How Autonomous Vehicle Ethics Will Challenge Attorney Client Privilege*, 34 GEO. J. LEGAL ETHICS 1043 (2021)

Moot Court: Best Brief: Beaudry first-year moot court competition (2020)
Beaudry Competition Co-Director (2022)

Clinic: Housing Advocacy and Litigation Clinic, Rising for Justice (2022)

THE COLLEGE OF WOOSTER — Wooster, OH
Bachelor of Arts, *cum laude*, in Political Science — May 2019
GPA: 3.65

Honors: National Champion, with co-counsel: Undergraduate moot court brief writing competition (2018)
Exemplar Honors: Highest possible grade on senior thesis
John D. Fackler Medal: Most accomplished in undergraduate moot court

Thesis: *Talking Red White and Blue: An Investigation into the Relationship between Polarization and Congressional Floor Speech* (110-page study on the relationship between common word usage in congressional speeches and party polarization)

EXPERIENCE

SIMPSON THACHER & BARTLETT, LLP — Palo Alto, CA
Litigation Associate — October 2022 – Present

- Generalist practice with experience in complex commercial, insurance, M&A, and securities litigation
- Responsible for widespread legal research and drafting for litigation in federal and state courts
- Completed over 100 hours of pro bono service for a Section 1983 prisoner rights case and helped write an amicus brief for *Alliance for Hippocratic Medicine v. FDA* in the U.S. Court of Appeals for the Fifth Circuit

HOUSING ADVOCACY AND LITIGATION CLINIC, RISING FOR JUSTICE — Washington, DC
Student Attorney — January – May 2022

- Represented tenants on issues of housing law in landlord-tenant court
- Appeared in court four times on behalf of clients for initial hearings and motion hearings

JOSEPH GREENWALD & LAAKE, PA — Greenbelt, MD
Litigation Law Clerk — May – August 2021

- Performed extensive legal research on employment litigation, civil rights, ADA, and discrimination lawsuits
- Drafted plaintiff side court documents and memoranda for cases in federal and state court

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA — Washington, DC
Judicial Intern for the Honorable Reggie B. Walton — January – April 2021

- Researched law and drafted documents for ongoing civil and criminal litigation matters regarding civil forfeiture, subpoena enforcement, motions to dismiss, and Fourth Amendment suppression hearings
- Helped prepare the Judge and clerks for federal court proceedings

INTERESTS

- Performing musician, instrumental Harp-Guitar (released full album of original songs)
- Graphic design and video editing (freelance work for peers and small businesses)
- Competitive chess player (captain of high school and college teams)

Record of: Dawson P. Honey
GUID: 826413497

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	001	92	Civil Procedure Naomi Mezey	4.00	B	12.00	
LAWJ	002	92	Contracts Girardeau Spann	4.00	B	12.00	
LAWJ	005	22	Legal Practice: Writing and Analysis Jessica Wherry	2.00	IP	0.00	
LAWJ	008	22	Torts Mary DeRosa	4.00	B+	13.32	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	37.32	3.11
Cumulative	12.00	12.00	37.32	3.11

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	003	22	Criminal Justice Shon Hopwood	4.00	P	0.00	
LAWJ	004	92	Constitutional Law I: The Federal System Yvonne Tew	3.00	P	0.00	
LAWJ	005	22	Legal Practice: Writing and Analysis Jessica Wherry	4.00	P	0.00	
LAWJ	007	22	Property K-Sue Park	4.00	P	0.00	
LAWJ	1326	50	Legislation and Regulation William Buzbee	3.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	18.00	0.00	0.00	0.00
Annual	28.00	12.00	37.32	3.11
Cumulative	30.00	12.00	37.32	3.11

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	015	05	American Legal History Daniel Ernst	3.00	A-	11.01	
LAWJ	1493	05	Prison Law and Policy Shon Hopwood	3.00	A-	11.01	
LAWJ	1526	05	The Law of Autonomous Vehicles Edward Walters	2.00	A-	7.34	
LAWJ	215	05	Constitutional Law II: Individual Rights and Liberties Peter Edelman	4.00	A	16.00	
LAWJ	3078	12	Commercial Space Law Caryn Schenewerk	2.00	A	8.00	

	EHrs	QHrs	QPts	GPA
Current	14.00	14.00	53.36	3.81
Cumulative	44.00	26.00	90.68	3.49

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1151	05	National Security Lawyering Seminar Mary DeRosa	3.00	A-	11.01	
LAWJ	1491	14	Externship I Seminar (J.D. Externship Program) Christina Smith		NG		
LAWJ	1491	92	~Seminar Christina Smith	1.00	B+	3.33	
LAWJ	1491	94	~Fieldwork 3cr Christina Smith	3.00	P	0.00	
LAWJ	165	09	Evidence Michael Pardo	4.00	A-	14.68	
LAWJ	361	03	Professional Responsibility Michael Rosenthal	2.00	P	0.00	
LAWJ	469	05	Supreme Court Litigation Seminar Donald Ayer	2.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	15.00	8.00	29.02	3.63
Annual	29.00	22.00	82.38	3.74
Cumulative	59.00	34.00	119.70	3.52

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	025	05	Administrative Law William Buzbee	3.00	B+	9.99	
LAWJ	1099	08	The Art of Regulatory War Seminar William Buzbee	2.00	A	8.00	
LAWJ	1609	09	Constitutional and Statutory Interpretation Seminar Victoria Nourse	2.00	A-	7.34	
LAWJ	1748	09	The Death Penalty in America Seminar Cliff Sloan	2.00	A	8.00	
LAWJ	329	08	Natural Resources Law Hope Babcock	3.00	A-	11.01	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	44.34	3.70
Cumulative	71.00	46.00	164.04	3.57

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	1739	05	Legislation Colloquium: Advanced Topics in Statutory Interpretation	2.00	A-	7.34	
LAWJ	178	09	Federal Courts and the Federal System	3.00	B	9.00	
LAWJ	358	05	Presentation Skills For Lawyers Seminar	2.00	P	0.00	
LAWJ	552	05	Housing Advocacy Litigation Clinic at Rising for Justice, Law Students in Court Division		NG		
LAWJ	552	80	~Seminar	2.00	A-	7.34	
LAWJ	552	81	~Casework	3.00	A	12.00	
LAWJ	552	82	~Professionalism	2.00	A-	7.34	

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Dawson P. Honey
GUID: 826413497

---------- **Transcript Totals** ----------

	EHrs	QHrs	QPts	GPA
Current	14.00	12.00	43.02	3.59
Annual	26.00	24.00	87.36	3.64
Cumulative	85.00	58.00	207.06	3.57

---------- **End of Juris Doctor Record** ----------

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I'm very pleased to support the application of Dawson Honey to be a clerk in your chambers. Dawson was in my Constitutional Law II class in fall 2020, and received an A. But, what is important is that there is much going on with Dawson. I had 76 students in my class during fall 2020, and we held the class on Zoom. I can tell you that there were students I would not recognize if I saw them on the street. Dawson was one of a handful who improved the class for all of the students, and for me as well. He was the person who responded when no one else said anything. He made great questions and comments and answers, regularly. He sees an angle that kept the discussion going for another 10 minutes, and always thoughtful. I die for those kinds of students. I need them. And they are not always there.

Since graduation, Dawson has been practicing as a generalist litigator at Simpson Thacher. There, he has been exploring many different arms of practice in jurisdictions all around the country. His career goal is to learn everything he can from top lawyers and judges in the field. He looks forward to coming to work each day and seeing his efforts have an impact on the trajectory of ongoing proceedings. The time he has spent in practice has confirmed for him that the lessons learned through a clerkship are the next step in developing his legal research and writing skills.

Dawson didn't live around lawyers. His father was a machinist (in Seattle) and his mother came from Finland. They went to college but no one had ever gone to law school. He found law his language. He wrote to me that "each concept was surrounded by pliable doctrine and complicated questions . . . It takes the constant intervention of good people to prevent rights from infringed." Good, I think. More. "In my comments during class discussions, I did my best to inject complexity and nuance into the arguments made by the peers and demonstrate that if the issue appears simple, there is likely an angle that we are not seeing yet." And that is exactly what he did in the class.

He said about the examination in his class, "I aimed to find an insightful balance between analysis and creativity." He did. He wanted to be a lawyer, but he also is a musician, a performing guitarist for ten years, and he found, "I use the creative skills I gained from my arts experience when solving legal problems. Given the flexibility and uncertainty that surrounds legal questions, crafting an argument and expressing it clearly follows the same paths of inspiration that I experience in music and graphic design. Finding a solution to a new legal issue is an exciting fusion of creativity and reflection that gives me the feeling of solving a puzzle and writing a song at the same time."

You need to meet this man. He is very special.

Sincerely,

Peter Edelman
Carmack Waterhouse Professor of Law and Public Policy

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing this letter with enthusiastic support for Dawson Honey, who is applying for a clerkship in your chambers. I write to share my experiences as his professor, and why he has demonstrated that he would be a great fit for a clerkship.

I have known Dawson since his first year in law school, when he was a student in my Criminal Justice course at Georgetown University Law Center. Dawson also took my Prison Law and Policy course in his second year. In my Criminal Justice class, I teach students criminal procedure, and specifically, front-end police and citizen encounters. Students learn the Fourth, Fifth, and Sixth Amendments in that class. Prison Law and Policy, by contrast, focuses on the back end of the criminal justice system, which is an enormously consequential but often overlooked issue in law school. I don't assign my students a casebook for this class. Instead, I make them read full cases to prepare them for life after law school. My method requires students to effectively pull out the most relevant portions of caselaw and then apply that caselaw to new circumstances, just as they will when they leave law school. On very competitive exams with a steep curve, Dawson did very well. He earned a pass in Criminal Justice because the law school went to a pass/fail option that semester due to the pandemic. Dawson had one of the best exams in class. And this past year, he earned an A- in my very challenging Prison Law and Policy class.

His analysis was well organized, his writing clear, and, unlike many of his colleagues, Dawson moved right to the issue the answers turned on. His analytical abilities is at the top of Georgetown law school students.

Throughout the semesters that I was his professor, Dawson consistently impressed me with his curiosity, passion for learning, and insight into the nuances of criminal law—a field he had never before studied. He was a delightful presence to have in the classroom, and he often injected the complexity and nuance into classroom arguments made by his peers. It was also clear from speaking to him that he is the type of aspiring lawyer who truly enjoys the law and is not afraid to express his opinions, though he always does so respectfully.

Now that he is in practice, I've also seen Dawson's pro bono work representing the typically unrepresented. I am very proud of the lawyer that Dawson has and will become. In sum, Dawson will make an exceptional lawyer and clerk. He has been a joy to work with, both inside and outside the classroom. I am happy to discuss his candidacy further at your convenience. And if you have any further questions, please don't hesitate to contact me.

Sincerely,

Shon Hopwood

Shon Hopwood - srh90@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

It is a pleasure to recommend Dawson Honey for a clerkship. Dawson graduated from Georgetown University Law Center in the class of 2022. I know him well. He was an exceptional student in my seminar on "The Death Penalty in America" in the fall of 2021.

Dawson's academic performance was outstanding. His seminar paper considered the need for improved evidentiary rules in capital sentencing proceedings. Dawson identified this very important topic on his own, based on his review of death penalty cases and related literature. Most impressively, he included specific suggestions for possible rules, an undertaking that reflected great initiative and constructive engagement. Dawson's analysis on this difficult subject is original, ambitious, thoughtful, and valuable.

Dawson also regularly made excellent contributions to our seminar discussions. He offered perceptive comments on the readings and raised interesting questions that sparked important conversations.

As part of our seminar, each student was assigned to lead the discussion in one class. Dawson met this challenge with gusto and skill. Discussing "individualized consideration and mitigating evidence" in death penalty sentencing, he successfully conveyed essential doctrinal points and generated lively exchanges from his classmates. He led a memorable and vital seminar session.

I also want to note Dawson's personal qualities. He is kind and personable, always interested in and respectful of those around him. He is well-liked and well-respected by his fellow students. I very much enjoyed my conversations with him, both in and out of class.

I am certain that Dawson Honey will be a superb law clerk. I recommend him enthusiastically and without reservation. Please let me know if any additional information would be helpful.

Sincerely yours,

Cliff Sloan
Distinguished Visitor from Practice
Georgetown University Law Center

Cliff Sloan - cliff.sloan@georgetown.edu

DAWSON P. HONEY

dawsonhoney@gmail.com • (206) 819-9492

Licensed to practice in California and admitted to the U.S. District Court for the Eastern District of California

Writing Sample

The attached writing sample is a portion of a memo that I wrote during my judicial internship with Judge Walton at the D.C. District Court. The case was in the Western District of Pennsylvania, where Judge Walton was a visiting judge. The proceeding was a Fourth Amendment motion where the defendant had requested items of evidence be suppressed due to constitutional violations.

My research in part 2(b) was utilized in the final motion order.

All legal research, writing, and editing were independent.

The issues discussed in this memo include:

- Whether there was reasonable suspicion to stop the defendant.
- Whether the defendant's arrest was supported by probable cause.
- Whether the defendant's consent to a car search was voluntary or coerced.
- Whether the defendant was entitled to a Franks v. Delaware hearing.

[redacted] (the "defendant"), is appearing before the Court for two motions. First, the defendant filed a pro se motion to call a Franks v. Delaware, 438 U.S. 154 (1978) hearing. Defendant's Motion for a Suppression Hearing, ECF No. 242 ("Def.'s Supr. Mot.") at 1. Second, the defendant filed a pro se motion to suppress evidence due to Fourth Amendment violations.[1] Defendant's Motion to Dismiss, ECF No. 246 ("Def.'s Mot. Dis.") at 1.[2] The Court ordered the United States of America (the "government") to file a combined response to both motions on or before March 20, 2020. Government's Omnibus Response, ECF No. 266 ("Gov. Resp.") at 2–3.

The defendant is charged with violating six different federal laws with sixteen total counts. The charges are as follows. The defendant is charged with six counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951 (Counts I, VI, VIII, X, XII, and XIV), one count of attempted Hobbs Act robbery (Count III), one count of using, carrying, and discharging a firearm during and in relation to an attempted crime of violence and possession of a firearm in furtherance thereof in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and (iii) (Count IV), two counts of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) (Counts V and XVI), and six counts of using, carrying, and brandishing a firearm during and in relation to a crime of violence, and possession of a firearm in furtherance thereof in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and (ii) (Counts II, VII, IX, XI, XIII, and XV). Second Indictment Memorandum, Document No. 196 ("Sec. Ind. Memo") at 1–7.

This memorandum addresses each of the defendant's motions in turn.

I recommend denying the defendant's motion for a Franks hearing because there is not enough to conclude that the challenged warrants were not made with falsity or reckless disregard for the truth. I further recommend that you deny the defendant's requests to suppress evidence because there is insufficient support to find that the defendant's Fourth Amendment rights were violated.

1. The defendant's motion for a Franks hearing

In Franks v. Delaware, the Supreme Court explained:

> [W]hen the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided, and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

[1] The defendant's two motions were filed pro se but later adopted by defense counsel. Gov. Resp. at 2.
[2] Labeled as "Evidential Suppression Hearing." Def.'s Mot. Dis. at 1.

Franks v. Delaware, 438 U.S. 154, 155–56 (1978).

In his motion for a Franks hearing, the defendant argues that "search warrants for the [residences] [redacted], and [redacted] [were] issued based only on the false statements made in the affidavit" and therefore the evidence resulting from those searches "should be suppressed [due] to the false statements and the [c]onstitutional violations."[3] Def.'s Supr. Mot. at 1.[4]

The defendant alleges two facts were recklessly disregarded by the police to acquire a search warrant for [redacted]. First, that the "two [] witnesses never identified [the defendant] as the person who committed the crime." Def.'s Supr. Mot. at 1. Second, that "[the defendant] presented receipts as to his whereabouts around the time [of the robbery.]" Id. To be entitled to a Franks hearing, the defendant must make "a substantial preliminary showing of intentional or reckless falsity on the part of the affiant." United States v. Rivera, 524 F. App'x 821, 826 (3d Cir. 2013) (citing United States v. Brown, 3 F.3d 673, 677 (1993)). To meet this burden, the defendant must offer "proof contradicting the affidavit, including materials such as sworn affidavits or otherwise reliable statements of witnesses." United States v. Yusuf, 461 F.3d 374, 383 n.8 (3d Cir. 2006) (citing Franks, 438 U.S. at 171).

The government correctly argues that the false statements alleged by the defendant are conclusory and do not undermine the probable cause of the warrant. Gov. Resp. at 18–33. The [redacted] warrant included information concerning the firearm, cellphone seized, similarities between past robberies, and ballistic tests showing a connection between the firearm and past robberies. Gov. Resp. at 31. The warrant for [redacted] did not contain any reference to the information that is challenged by the defendant, see Gov. Resp. Exhibit ("Ex.") C (Affidavit of Detective [redacted] (January 22, 2015) ("[redacted] Affidavit")) at 4, and neither the removal of the witness' statements nor the inclusion of the receipts are sufficient to erode the probable cause of the warrant. See Franks, 438 U.S. at 171 (holding that a defendant must show that "the false statement was necessary to the finding of probable cause").

The defendant argues in the alternative that even if the warrant is valid, the police exceeded the scope of the warrant for [redacted] when they "seized a 'NorthFace Vest' which was not any of the specific items stated in the search warrant and a 'Carhart Coat' which was not any of the specific items stated in the search warrant." Def.'s Supr. Mot. At 3. The warrant in question identifies among the items to be seized, "a black jacket that contains multiple silver items attached to the jacket." Gov. Resp. Ex. C ([redacted] Affidavit) at 5. The

[3] The defendant does not explicitly challenge the warrant used to search his vehicle. Nonetheless, the government correctly argues that the warrant was valid stating that "the affidavit was offered in support of a warrant to search the vehicle that had likely been used in the robbery . . . [and] the judge had substantial basis to conclude that there was a fair probability that contraband or evidence of the robbery would be located in the vehicle that had been used in the robbery." Gov. Resp. at 29.

[4] The government notes that there was no warrant issued for the house at [redacted]. Gov. Resp. at 33. Rather, they obtained verbal and written consent from the defendant's wife, a co-renter of the property. Id.; see United States v. Al-Salabi, 385 F. App'x 127, 128 (3d Cir. 2010) (quoting Georgia v. Randolph, 547 U.S. 103, 106 (2006) ("The Fourth Amendment recognizes a valid warrantless . . . search . . . when police obtain the voluntary consent of [one] who shares, or is reasonably believed to share, authority over the area in common[.]")).

government correctly argues that the lack of specificity does not defeat the warrant in this case as the jackets were in plain view. Gov. Resp. at 31–32 (citing United States v. Menon, 24 F.3d 550, 559 (3d Cir. 1994); Horton v. California, 496 U.S. 128, 136–137 (1990)). The Supreme Court in Horton established three requirements to seize items in plain view: (1) the officer must lawfully "arrive at the place from which the evidence could be plainly viewed (2) the incriminating nature of the evidence must be "immediately apparent" and (3) the officer must have "a lawful right of access to the object itself." Horton, 496 U.S. at 136, 110. The first prong is satisfied because the search was done in pursuit of a valid warrant. Gov. Resp. at 32. The second prong is satisfied because the officers were familiar with the string of robberies in question and recognized the jackets as the same type that were worn by the suspect, making the incriminating nature of the jackets immediately apparent. Id. The third prong is satisfied because the officers noted in the warrant that they were searching for clothing involved in the string of robberies. Id.

Recommendation: I recommend denying the defendant's motion for a Franks hearing at this time.

2. The defendant's requests to suppress evidence obtained during detainment and arrest due to Fourth Amendment violations.

The defendant requests the Court suppress evidence obtained during his initial detainment and subsequent arrest at [redacted] because of Fourth Amendment violations.[5]

a. Whether the initial stop and detainment of the defendant was supported by reasonable suspicion.

In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court held that:

> In determining whether the seizure and search were "unreasonable" our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

Terry v. Ohio, 392 U.S. 1, 18–20 (1968).

In this case, the defendant was stopped by the police because his vehicle matched the license plate number and physical description of a car that was used for an armed robbery only minutes before. The vehicle additionally matched the description of a car used in a similar armed robbery several days prior. The government correctly argues that handcuffing and patting down the defendant was proper in this case. As the sole occupant a vehicle that may have been used in an armed robbery, the officer had reasonable suspicion to detain the defendant. Terry v.

[5] The defendant asserts, and the government does not dispute, standing over the vehicle where evidence was found because of his "substantial control over and thus a reasonable 'expectation of privacy' in a borrowed vehicle." Def.'s Mot. Dis. at 2 (citing United States v. Baker, 221 F.3d 438, 443 (3d Cir. 2000) (granting standing for a borrowed vehicle)).

Ohio, 392 U.S. 1, 27–28 (1968). The officer had a reasonable belief that the defendant may have been armed, permitting his restraints and a search of his immediate area of control. Id.

b. Whether the arrest of the defendant was supported by probable cause

Probable cause is established on the totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 238 (1983). For officers making an arrest, probable cause is determined by "weighing the inculpatory evidence against any exculpatory evidence available to the officer." Wilson v. Russo, 212 F.3d 781, 791 (3d Cir. 2000).

The vehicle and license plate match, standing alone, are sufficient for probable cause to arrest the defendant. See United States v. Elmore, 548 F. App'x 832, 837 (3d Cir. 2013). In Elmore, the Third Circuit found that officers had probable cause because "[the defendant] was found within 15 miles of the bank an hour and a half after the robbery, operating a vehicle whose description and license plates were an exact match to those provided by a reliable eyewitness." Id. In this case, as in Elmore, the totality of the circumstances supports a finding of probable cause because the inculpatory evidence outweighs the exculpatory evidence.

c. Whether the defendant's consent to search his car was voluntary

In Schneckloth v. Bustamonte, the Supreme Court held that "one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). The scope of a search is defined by its expressed object, Florida v. Jimeno, 500 U.S. 248, 251 (1991) (citing United States v. Ross, 456 U.S. 798 (1982)), and a person granting an officer permission to search their car is free to limit the scope of the search. Jimeno, 500 U.S. at 251. However, officers are not required to acquire consent for each section of the car. Id. Whether an individual's consent to search is voluntary or coerced is evaluated based on "the totality of the circumstances." United States v. Drayton, 536 U.S. 194, 207 (2002); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). The government bears the burden of determining that consent was "freely and voluntarily given" by the preponderance of the evidence. United States v. Price, 558 F.3d 270, 277 (3d Cir. 2009) (quoting Bumper v. North Carolina, 391 U.S. 543, 548 (1968)).

The defendant argues that he did not voluntarily consent to the initial search of his car. The defendants states that his "4th Amendment rights were violated due to involuntary consent to search [the] vehicle[,]" Mot. Dis. Supplement at 1, and "[his] consent was involuntary [due] to the condition of when the [] consent was given." Id. at 2. The defendant alleges that he was coerced into signing a "consent to search form" and a "Miranda rights form." Id. The defendant is diabetic and was experiencing symptoms of low blood sugar during the time of his arrest. Id. The defendant alleges that when he told the officer that "his sugar levels are low[,] that he was feeling dizzy[,] and he needed something to eat or drink," the officer replied, "sign a consent to search form, and a Miranda rights form[,] then he [could] get something to raise his sugar

levels."[6] Id. The defendant additionally states that he "asked the officer [if he could make] a call [] to his wife and the officer stated only if you sign the forms." Id.

The government "disagrees with [the] defendant's rendition of the facts." Gov. Resp. Supplement at 4. The government argues that the defendant "gave verbal permission to search [the vehicle,]" id. at 3, and that prior to signing the consent form, Sergeant [redacted] "read the form to [the] defendant, informing him that he did not have to consent to the vehicle search." Id. at 4. The government further states that at the motions hearing, they will call Sergeant [redacted] to testify on the veracity of these and other facts. Id. at 3–4.

The government does not directly counter the defendant's factual claim that food and a phone call were withheld on the condition of his consent. Instead, the government argues that "[w]hen a consent to search form contains an affirmative statement [] that [the] consent was voluntary and that no one threatened or promised anything in exchange for consent, it convincingly counters a defendant's after-the-fact allegations of promises or coercion." Id. at 3 (citing United States v. Orr, 2019 WL 3837987, at *5 (M.D. Pa. Aug. 15, 2019) (holding that a defendant's allegations of coercion were not credible and did not outweigh the testimony of officers)). The government correctly argues that signing a consent form laying out the subject's rights is "an unambiguous demonstration of the voluntariness of consent." Gov. Resp. Supplement at 3 (citing United States v. Baer, 2016 WL 4718214, at *6 (D.N.J. Sep. 9, 2016)); see also United States v. Hernandez, 76 F. Supp. 2d 578, 581 (E.D. Pa. 1999) (holding voluntary consent was given upon signing a consent form explaining the right to refuse), aff'd, 263 F.3d 160 (3d Cir. 2001). The form signed by the defendant clearly states that he "may refuse to consent" and "revoke . . . consent to search at any time." Gov. Resp. Ex. D, J83 (Consent to Search Form (December 26, 2014) ("Consent Form")) at 1. Both the content of the form and the defendant's consent were unambiguous in this case.

The defendant argues in the alternative that even if the consent was voluntary, the "police exceeded the scope of the [] consent" when the officers searched the trunk. Mot. Dis. Supplement at 3. Consent to search a car extends to the trunk and to discrete containers within the car in certain circumstances.[7] See, e.g., United States v. Birt, 120 F. App'x 424, 428–429 (3d Cir. 2005) (holding that a defendant's consent to a vehicle search extended to the trunk and an overnight bag within); United States v. Morales, 861 F.2d 396, 397 (3d Cir. 1988) (holding that the scope of driver consent to search a vehicle extended to its trunk and glove box); United States v. Perez, 246 F. App'x 140, 146 (3d Cir. 2007) (holding that a search of a zippered bag in a vehicle's trunk did not exceed the scope of valid consent); Gooch, 915 F. Supp. 2d at 715

[6] The government's summary of the facts does not go into detail about the two forms that the defendant signed in the back of the police car, merely stating that "defendant provided verbal and written consent to search the vehicle." Gov. Resp. at 7; see also Gov. Resp. Ex. D, J83 (Consent to Search Form (December 26, 2014) ("Consent Form")) at 1.

[7] The defendant correctly notes that the Supreme Court included dicta in Florida v. Jimeno stating that it is likely "unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk . . . ." Jimeno, 500 U.S. at 252. However, in this case the defendant does not allege that the items seized from the trunk were in a locked briefcase. Rather, the defendant simply states that "some items [were retrieved] from the trunk area." Def.'s Mot. Dis. at 3.

(holding that consent to search a vehicle extended to a book bag in the trunk). The defendant's consent to search also extends to the secret compartment within the vehicle given that he "directed the officers to [the] hidden compartment[.]" Gov. Resp. at 7.[8]

Recommendation: I recommend denying the defendant's requests to suppress evidence at this time.

[8] Even in the absence of the defendant's direction, the scope of consent likely extended to the secret compartment. See Morales, 861 F.2d at 401 (holding that consent extended to a vehicle's hidden compartments that were readily accessible); United States v. Diaz-Albertini, 772 F.2d 654, 655 (10th Cir. 1985) (holding that consent extended to a vehicle's secret compartment discovered by unscrewing a metal plate with non-factory screws). But see Gooch, 915 F. Supp 2d at 717–716 (holding that consent to search a vehicle did not permit officers to rip out the lining of the vehicle's trunk).

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Writing Sample

The attached writing sample is my brief that won first place in the Beaudry moot court competition. The case was a fictional First Amendment issue where the City of Hotung Transit Authority (Transit) instituted a policy that banned "issue-based" advertising on the sides of city buses. This policy covered a wide range of issues including politics and religion. The Plaintiffs, a coalition of Baptist Churches, filed suit after their advertisement encouraging Baptist worship was rejected by the transit.

All writing and editing were independent. The competition was a closed packet where outside research was forbidden.

The issues analyzed include:

- The Free Speech Clause
- The Free Exercise Clause
- The Religious Freedom and Restoration Act (RFRA).

STATEMENT OF FACTS

The Hotung Transit Authority (the Transit) operates both Metrorail and Metrobus services in the State of Hotung. *Baptist Convention of Hotung v. Hotung Transit Auth.*, 124 F. Supp. 4th 137, 137 (D. Hot. 2018). In the 1970s, the Transit started selling bus and train space to private advertisers. *Id.* After receiving decades of complaints about advertisements that promoted drug-related, politically offensive, and gruesome topics, the Transit feared that controversial issue-oriented advertisements could incite violence that would threaten the safety of metro riders. *Id.* To abate this risk, the Transit implemented a policy that reserved bus and train space for "purely commercial" advertisements. *Id.* The policy prohibits any advertisements on the topics of: politics, industry goals, religion, and any other issue where there are varying public opinions. *Id.* The policy does not apply to public bus shelters and allows religious organizations, like the Salvation Army, to advertise on topics like charity fundraising. *Id.* at 138, 146 n.3.

In 2016, the Petitioners, a group of Baptist churches, submitted an advertisement to the Transit as part of an evangelization campaign to encourage participation in Baptist Easter services. The advertisement depicted a symbolic lamb on a mountain top with the words "Rise in Shine" printed in calligraphic lettering. *Id.* The advertisement linked to a page that read "HE IS RISEN. CELEBRATE CHRIST'S RESURRECTION AND SHINE WITH US THIS EASTER." *Id.* at 138. The website contained six links with extensive information about Christ's resurrection, traditional ways to observe Easter Sunday, locations of local Baptist churches, and opportunities to aid their charitable partners. The Transit rejected the advertisement as submitted because it was not purely commercial and promoted a religious topic. In alternative, the Transit offered advertising mediums such as social media, newspapers, and public bus shelters. *Id.* Petitioners then filed suit alleging that the section of the policy which covers religious

advertisements is unconstitutional under the First Amendment and Religious Freedom and Restoration Act (RFRA).

SUMMARY OF ARGUMENT

The Transit's policy is constitutional under the First Amendment for two reasons. First, the policy is constitutional under the Free Speech Clause because it makes reasonable distinctions on the basis of topics, rather than viewpoints. A state action is constitutional when it does not prohibit religious viewpoints on topics which would otherwise be permitted. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). Petitioners' advertisement was on a religious topic that would not be permitted no matter what organization submitted it. The Transit's policy is also reasonable because drawing a line between issue-oriented and commercial advertising is a sensible distinction to address the problem of excessive controversy. Second, the policy is constitutional under the Free Exercise Clause because it is neutral to religion and does not single out any religious conduct. A policy is neutral and permitted by the Free Exercise Clause when the goals of the policy do not impose any special punishments or disadvantages on the basis a religion. *Trinity Lutheran Church of Colombia v. Comer*, 137 S. Ct. 2012 (2017). This policy imposes no disadvantage nor special penalty on the basis of any religious belief, making it consistent with the Free Exercise Clause.

The Transit's policy is constitutional under the RFRA for two reasons. First, the policy imposes no substantial burden. To show a substantial burden, Petitioners must demonstrate that the state action in question compelled them to engage in conduct their religion forbids or prevented them from engaging in conduct their religion requires. *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001). Because of the alternative forms of advertisement, all of which were functionally identical or superior to bus and train advertising, Petitioners have not demonstrated a substantial burden. Second, even if there is a substantial burden, safety and proper use of public

transit are compelling interests that are furthered through the least restrictive means. This Court has consistently ruled that ensuring the safety, proper usage, and availability of public resources is a compelling state interest. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). Not publishing Petitioners' advertisement furthers this interest because religion is an inherently divisive topic and advocating one belief or practice over others will always incite controversy. The provocativeness of advertisements should be evaluated in light of the least receptive audience. The Transit is also justified in enacting this policy because controversial advertisements have caused retaliation against public transit in past cases. *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489 (9th Cir. 2015). The Transit is not obligated to wait until citizens are in peril to take proactive measures to prevent their endangerment. *DiLoreto v. Downey Unified School Dist. Bd. of Educ*, 196 F.3d 958 (9th Cir. 1999).

ARGUMENT

I. The Transit's policy makes pragmatic, neutral, advertising distinctions that are constitutional under the First Amendment

All rights are important, but no right is absolute. A state action regulating speech is constitutional under the Free Speech Clause when it is based on topics, rather than viewpoints, and is reasonable. *Baptist Convention of Hotung v. Hotung Transit Auth.*, 542 F.4d 206, 206 (13th Cir. 2018). Under the Free Expression clause, State actions relating to expression are constitutional when the construction of the policy is facially neutral and not specifically designed to "infringe upon or restrict practice because of religious motivation." *Id.* at 210 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)).

The Transit's policy is constitutional under both the Free Speech and Free Expression Clauses. The Transit's policy is constitutional under the Free Speech clause because reserving metro advertisements for purely commercial messages is a topic-based distinction and is a

reasonable means of preventing inflammatory, controversial topics. The Transit's policy is constitutional under the Free Expression clause because it is a neutral law of general applicability that does not specifically target religious conduct.

a. The policy makes topic-based, reasonable distinctions that are consistent with the Free Speech Clause

i. The policy makes topic-based distinctions because it applies a broad restriction on all issue-oriented subjects

The Transit's decision not to publish Petitioners' advertisement is part of a broad policy to reserve space for purely commercial advertising. When the intent of the advertisement is to create a commercial benefit for the advertiser, there is an incentive to avoid controversy and public ire. This incentive is reversed with issue-oriented advertisements, where stoking the flames of public opinion to spread awareness is a common tactic. *See Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489 (9th Cir. 2015) (involving a situation where violent retaliation was incited by provocative issue-oriented bus advertisements).

The Transit chose not to publish Petitioners' advertisement because it was focused on a controversial issue-oriented topic, not because it was expressing a religious perspective. Speech distinctions made on the basis of "topics" are constitutional, whereas targeting specific "viewpoints" for exclusion is violative of the Free Speech Clause. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-830 (1995). This Court found in *Rosenberger* that the University of Virginia was discriminating on the basis of viewpoint because it barred a student magazine from expressing religious perspectives on topics that were "otherwise permitted," such as race, poverty, and homosexuality. *Id.* at 831. The policy of the university made viewpoint distinctions because it would have allowed discussion on the same topics by secular organizations, but not religious ones. *Id.* This case is distinguishable from *Rosenberger* in two ways. First, unlike the university's policy in *Rosenberger*, the Transit's policy covers all

"issue-oriented advertising," regardless of whether the organization is secular or religious. *Baptist Convention of Hotung v. Hotung Transit Auth.*, 124 F. Supp. 4th 137, 137 (D. Hot. 2018). Under the Transit's policy, advertising issue-oriented topics like race, poverty, and homosexuality would not be approved regardless of the affiliation of the institution. Second, Petitioners' advertisement was a religious viewpoint on a religious topic, not a religious viewpoint on a secular topic like the magazine in *Rosenberger*. The visuals of the advertisement featured imagery of a sacrificial lamb, a symbol with powerful and intrinsic connections to Christian topics. *Id.* Additionally, the imagery of the advertisement cannot be viewed in a vacuum. The stated intent of the advertisement was to promote the inherently religious topic of Baptist church attendance in observance of the resurrection of Christ. The Transit would not have permitted an advertisement on the topic of Christ's resurrection regardless of whether the organization submitting it was secular or religious. *Id.*

The case at bar is similarly distinguishable from this Court's decisions in *Lamb's Chapel* and *Good News*. This Court in *Lamb's Chapel* struck down a policy which prevented a religious group from showing a movie about Christian family values. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 386 (1993). Since family values are a secular topic, preventing religious perspectives on family values, but not secular perspectives, was viewpoint discrimination. *Id.* The policy struck down in *Good News* prevented a religious organization from using public event space to promote Christian moral values. Because the policy would have permitted morals taught by Aesop's fables, but not morals taught by Christian doctrine, it was viewpoint discrimination. *Good News Club v. Milford Cent. School*, 533 U.S. 98, 108 (2001). This Court acknowledged in *Good News Club* that the State has an interest in "reserving [its property] for the discussion of certain topics." *Good News Club*, 533 U.S. at 106 (citing

Rosenberger, 515 U.S. at 829). The Transit's policy in the case at bar is distinguishable from the policies in *Good News Club* and *Lamb's Chapel* because it evaluates advertisements based on whether the topic is purely commercial and not on whether the perspective is religious.

This policy makes constitutional distinctions on the basis of topics rather than viewpoints, as evidenced by the Salvation Army advertisement that was approved by the Transit. The Salvation Army advertisement promoted a holiday fundraising drive with the words: "Give Hope. Change Lives." *Baptist Convention of Hotung,* 124 F. Supp. 4th at 147 n.3. The Salvation Army is a religious institution that was expressing a viewpoint on the secular topic of charity fundraising. The same is not true of Petitioners' advertisement. While the Petitioners' advertisement did contain links to affiliated charitable partners, they were buried behind five other webpages which exclusively discussed the topic of Christ's resurrection. *Id.* at 138. Petitioners' advertisement is almost entirely devoted to the topic of Christ's resurrection, and would not have been approved by the Transit even if it were submitted by a secular organization.

ii. The policy is reasonable because it is an appropriate and sensible response to the problem of contentious advertising

The Transit's decision to distinguish between commercial and issue-oriented topics is reasonable. Because the Transit makes distinctions on the basis of topics rather than viewpoints, it need only make those distinctions on a reasonable basis to be consistent with the Free Speech Clause. *Lamb's Chapel*, 508 U.S. at 385. This Court applies a "forgiving test" to determine the reasonableness of topic-based distinctions. *Minn. Voters All. v. Mansky,* 138 S. Ct. 1876, 1888 (2018). A government action only needs to be an appropriate response to an articulated problem with a sensible basis for making distinctions. *Id.* at 1886-88. The Transit is not required to open the gates to "all who wish to exercise their right to free speech…without regard to the nature of the property or to the disruption that might be caused." *Id.* at 1885-86 (quoting *Cornelius v.*

NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 799-800 (1985)). Drawing a line about what speech is allowed on public property is permitted so long as that line is "reasonable in light of the purpose served by the government property." *Cornelius*, 473 U.S. at 806.

Drawing the line based on the incentive difference between commercial and issue-oriented advertisements is a sensible basis for making topic distinctions. Issue-oriented topics have a strong incentive to stir public dialogue through controversy, whereas commercial advertisers have an incentive to avoid negative publicity. The policy seeks to avoid the unnecessary and dangerous controversy of provocative, issue-oriented advertising that it experienced in the past. Before the policy, the Transit received decades of complaints about disrespectful and offensive advertising. *Baptist Convention of Hotung*, 124 F. Supp. 4th at 137. The Transit reserved advertising space for topics which are the least likely to incite controversy or violence as a preemptive step to avoid further escalation. *Id.*

This Court has upheld nearly identical policies in the past. In *Lehman*, this Court upheld a policy which excluded political advertising from buses. *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958, 968 (9th Cir. 1999) (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion)). The policy in *Lehman* was reasonable because of the state's commanding interests in avoiding "chances of abuse" and "the appearance of favoritism." *Id.* Political speech is just as important to the First Amendment as religious speech, but when topic distinctions are made on the basis of sensible means and serve a legitimate interest, they are reasonable. *Id.* In this case, as in *Lehman*, the Transit is making sensible and legitimate distinctions for the use of public advertising spaces that are sufficient to meet constitutional muster. *See also N. Pa. Freethought Society v. Cty. of Lackawanna Transit System*, 938 F.3d 424, 438 (3d Cir. 2019) (citing *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 865 (7th Cir. 2008)

(a specialty license-plate rule which prohibited "the entire subject" of abortion was a constitutional topic based distinction)).

The Transit's policy it is sufficient to satisfy this Court's precedent even though it does not define a "religious belief" or "practice" in explicit detail. *Id.* Exhaustive definitions of what conduct is religious are not required to meet First Amendment scrutiny. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018) (quoting *Burson v. Freeman*, 504 U.S. 191, 194 (1992) (plurality opinion)). In *Burson v. Freeman*, a plurality of this Court upheld a Tennessee law which aimed to prevent voter intimidation by restricting political "campaigning" within 100 feet of a polling place. *Id.* The Tennessee law was a broad prohibition of any "campaign related messages." *Id.* The limits of what a campaign related message was were not described with exact precision. However, the law met constitutional muster because the restriction was a reasonable action to combat voter intimidation. *Id.* In this case, as in *Burson*, the state action is appropriate because it attacks the problem at its roots. Just as restricting campaign messaging directly counters the threat of voter intimidation, restricting issue-oriented topics on buses and trains directly counters controversy and complaints relating to those topics. The potential for violence that flows from controversial advertising creates unnecessary and preventable risks for metro riders. Preventing such issue-oriented advertising from being on the sides of buses and trains is an appropriate and direct response to alleviate this risk.

b. The Transit's policy is a neutral and generally applicable law that is constitutional under the Free Exercise Clause

The Transit's policy of reserving bus and train space for purely commercial advertisements is neutral towards religion. This Court has made clear that distinctions in the service of a neutral law that does not impose "special disabilities on the basis of religious view or religious status" are permitted by the Free Exercise Clause. *Trinity Lutheran Church of*

Colombia v. Comer, 137 S. Ct. 2012, 2017 (2017) (citing *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 485 U.S. 872, 877 (1990)). Neutral laws are inconsistent with the Free Exercise Clause only when the text, circumstances, and application of the law reveal a discriminatory animus that is "easy to ferret out." *Comer*, 137 S. Ct. at 2018 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993)). In *Trinity Lutheran Church of Colombia v. Comer*, this Court struck down a law that singled out churches and other religious organizations, categorically disqualifying them from receiving government benefits. *Id.* Unlike the Transit's policy, the law in *Comer* was not facially neutral and explicitly intended to target religious groups. By contrast, the Transit's policy is a broad sweeping rule that reserves metro advertising space for commercial interests. In addition to religious advertisements, the policy covers statements opposing religion, political messaging, industry advocacy, and any other advertisement "regarding an issue where there are varying opinions." *Baptist Convention of Hotung*, 124 F. Supp. 4th at 137.

The Transit's policy is motivated by interests which are neutral towards religion. The Free Exercise Clause allows state actions to regulate on the basis of a "distinct category." *Comer*, 137 S. Ct. at 2023 (quoting *Locke v. Davey*, 540 U.S. (first page omitted from packet), 721 (year omitted from packet)). In *Davey*, this Court upheld a Washington State policy which prohibited state scholarships from funding individuals who intended to become priests or other religious practitioners. *Id.* The policy in *Davey* was neutral because it did not exclude degrees at religiously affiliated institutions but rather had chosen not to fund a "distinct category of instruction." *Id.* Similarly in this case, the Policy does not simply ban all advertisements from religious institutions. Rather, Transit's policy is a neutral rule which distinguishes between the broad categories of "commercial" and "issue-oriented," reserving bus and train space for the

former. *Baptist Convention of Hotung*, 124 F. Supp. 4th at 137. The Transit's policy, taken as a whole, is neutral towards religion because it makes its determinations based on distinct categories and applies equally to advertisements that are both supportive and adverse towards religion.

Additionally, the Transit's policy does not impose any "indirect coercion or penalties on the free exercise of religion" which would implicate Free Exercise protections. *Comer*, 137 S. Ct. at 2021 (quoting *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 450 (1989)). The Petitioners incur no detriment by advertising on non-metro spaces, speaking in public, handing out literature, any other form of proselytizing. The factors and intentions surrounding the Transit's policy indicate that it is neutral towards religion and constitutional under the Free Expression Clause.

II. The Transit's policy imposes minimal burdens and furthers a compelling state interest using the least restrictive means, making it constitutional under the RFRA

The Transit's policy is a constitutional exercise of state authority that is consistent with the RFRA. The RFRA prevents substantial burdens on sincere religious practices, unless the burden is justified by compelling state interests furthered through the least restrictive means. 42 U.S.C § 2000bb-1(a)-(b). The beliefs of the Petitioners are sincere. However, this policy exerts no substantial burden on religious practice. Assuming arguendo that it does, the Transit's policy furthers the compelling state interest of public transit safety and is the least restrictive means because nothing less than a full prohibition on issue-oriented advertising will achieve this goal.

a. The policy does not impose a substantial burden because of the ample and more effective options available to Petitioners

Petitioners have not met the substantial burden requirement of the RFRA. To trigger the compelling interest test of the RFRA, Petitioners must first prove that the policy places a substantial burden on their ability to practice their religion. 42 U.S.C §§ 2000bb-1(a)-(b). Only

after a substantial burden is proven does the burden shift to the government to demonstrate that the policy furthers a compelling interest through the least restrictive means. *Burwell v. Hobby Lobby*, 573 U.S. 682, 724 (2014). To be a substantial burden, the Transit's policy must impose more than a mere "inconvenience on religious exercise." *Id.* at 1144 (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004)). Federal courts do not "rubber stamp" any claim of a substantial burden. *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Serv.*, 818 F.3d 1122, 1145 (11th Cir. 2016). A substantial burden only exists if the Transit's policy compels Petitioners "to engage in conduct that their religion forbids," or "prevents them from engaging in conduct their religion requires." *Henderson v. Kennedy*, 253 F.3d 12, 16-17 (D.C. Cir. 2001) (citing *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 389, 384-85 (1990)); *Goodall by Goodall v. Stafford Country Sch. Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995); *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011).

The Transit's policy is not a substantial burden because it exerts no pressure to "modify… behavior" or "violate… beliefs." *Branch Ministries v. Rossotti*, 211 F.3d 137, 25 (D.C. Cir. 1999) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). When there are reasonable alternatives for the form of religious expression, there is no substantial burden. *Mahoney*, 642 F.3d at 1120. (citing *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981)). This Court in *Heffron* upheld a state fair policy which prohibited a religious group from distributing written materials because it did not "unnecessarily limit" their right to speak on the fairgrounds. *Id.* There were numerous and identically effective alternatives available for the exercise of religion, making the policy a minimal burden. *Id.* Similarly in this case, Petitioners are not forced to engage in any conduct and are able to use many alternate venues for public advertising. Advertisements are everywhere;

the Petitioners had the entirety of the internet, social media, street signs, public bus shelters, in-person literature distribution, and newspapers to spread their message. *Baptist Convention of Hotung*, 124 F. Supp. 4th at 138. The Petitioners claim that not being able to advertise on buses and trains substantially burdens their religious practices by preventing them from reaching underserved areas. *Id.* However, there is no evidence within the record indicating that using metro advertisements would be an effective way of reaching these areas. The Transit's policy, as applied to Petitioners, does not impose a substantial burden on their ability to practice religion because the Petitioners had alternative venues to advertise, all of which were functionally equivalent or superior to metro advertisements.

b. The policy furthers a compelling state interest through the least restrictive means, making it constitutional even if there is a substantial burden

i. Protecting the safety and proper use of public transit is a compelling interest

Preserving the safety and usability of public transit is a compelling interest of the state. The state has a responsibility to protect the safety of its citizens, particularly when they are utilizing resources like public transit. The Transit is allowed to regulate speech as a means of "ensuring peace" and "avoiding controversy" that may disrupt the functions of public property. *Cornelius*, 473 U.S. at 809-10. This Court recognized in *Cox v. Louisiana* that "maintaining public order and avoiding violence" are compelling government interests. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). Buses and trains are uniquely at risk for violence because they carry people in a confined space. Any physical retaliation directed at a metro advertisement risks harm to innocent riders. Allowing provocative and inflammatory topics on the sides of buses and trains would paint a target on the back of every person inside.

Transit's decision to reject Petitioners' advertisement directly furthers their compelling interest of maintaining safety on buses and trains. The RFRA requires that the asserted interest is

furthered by the actions against the "particular claimant." *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015). This Court should evaluate the potential impact of controversial advertisements in light of the *least receptive* audience. Not publishing Petitioners' advertisement prevents the disputes that come with religious topics. Religion is an "inherently" divisive topic that sparks "social conflict" and tumult. *Van Orden v. Perry*, 545 U.S. 677, 698 (2005). The Petitioners represent only one sect of one religion. If Petitioners' advertisement encouraging Baptist worship were observed in communities of other sects or other religions, it would cause significant uproar. An advertisement which encourages viewers to partake in a specific religious belief at the expense of others will always risk catalyzing social tensions and galvanizing vulnerable communities.

The danger posed by issue-oriented advertising is not speculative. Controversy surrounding advertisements poses a serious threat to bus and train commuters. The Transit "need not wait until havoc is wreaked" to take measures to protect public property. *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999) (quoting *Cornelius*, 473 U.S. at 810). In *Seattle Mideast Awareness Campaign v. King County*, the 9th Circuit upheld a metro policy which prohibited controversial advertising on buses. *Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 501 (9th Cir. 2015). After a string of inflammatory advertisements, King County received numerous threats to vandalize buses, organize riots at bus stops, block streets, and disrupt service through violence. *Id.* at 489. The court upheld the King County Metro policy because preventing the danger that controversial advertisements posed to the safety and usability of public buses was a commanding state interest. *Id.* In this case, just as in *Cox*, *Cornelius*, and *Seattle Mideast Awareness Campaign*, the safety of public buses and trains is a compelling interest and the Transit is justified in taking proactive steps to avoid situations like the one in King County.

ii. Reserving bus space for purely commercial advertisements is the least restrictive means for protecting bus rider safety

The Transit's policy is the least restrictive means of preventing inflammatory and potentially dangerous advertising. State actions which are tailored to the specific conduct which they aim to prevent are the least restrictive means. *Mahoney v. Doe*, 642 F.3d 1112, 1119 (D.C. Cir. 2011). Reserving bus space for commercial advertising is the least restrictive means of preventing the dangers of that issue-oriented advertisement causes. The threat of inflammatory issue-oriented advertising is self-apparent, and nothing less than prohibiting the types of advertising with the strongest incentives to create controversy would be effective in stymieing that threat.

The Transit's policy is a constitutional exercise of their responsibility to protect commuters. Commercial advertisements have a strong interest in avoiding controversy. However, issue-oriented advertisements have a strong interest in creating it. The Transit has a duty to prevent the riders of their buses and trains from becoming the innocent victims of public rancor. Because the Transit makes neutral, topic-based distinctions that further compelling interests without exerting a substantial burden, the policy is constitutional under both the First Amendment and the RFRA.

CONCLUSION

For these reasons, the decision of the Thirteenth Circuit should be affirmed.

Applicant Details

First Name	**Jonathan**
Last Name	**Hong**
Citizenship Status	**U. S. Citizen**
Email Address	**jsh162@georgetown.edu**
Address	**Address** Street **8516** City **Countrybrooke Way** State/Territory **Maryland** Zip **21093** Country **United States**
Contact Phone Number	**4102584096**

Applicant Education

BA/BS From	**Towson University**
Date of BA/BS	**May 2020**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 12, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Environmental Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Thompson, Robert
rbt5@georgetown.edu
Rogers, Brishen
br553@georgetown.edu
2023346078
Krishnakumar, Anita
anita.krishnakumar@georgetown.edu

References

Professor Anita Krishnakumar
ak1932@georgetown.edu

Professor Robert Thompson
thompson@law.georgetown.edu

Professor Brishen Rogers
br553@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jonathan Hong
8516 Countrybrooke Way, Lutherville Timonium, MD
6/20/2023

The Honorable Judge Patrick Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts,

I am writing to apply for a 2023-2024 clerkship with your chambers. I am a recent graduate at the Georgetown University Law Center where I graduated Cum Laude and was an executive editor of the Georgetown Environmental Law Review.

As an aspiring litigator with extensive research and writing experience, I believe I would make a strong addition to your chambers. During law school, I was able to obtain practical experience by helping draft an amicus brief relating to federal bankruptcy law. Out of term, I honed my research and writing skills by writing various memos for litigation partners on federal procedural issues. My experience as an executive editor on the Georgetown Environmental Law Review allowed me to engage in a leadership role while working with authors to improve their submissions.

My resume, unofficial transcript, and writing sample are submitted with this application. Georgetown has submitted my recommendations from Professor Anita Krishnakumar, Professor Brishen Rogers, and Professor Robert Thompson. I would welcome the opportunity to interview with you, and look forward to hearing from you soon.

Respectfully,

Jonathan Hong

JONATHAN HONG

401 Massachusetts Ave Apt #715 Washington, DC 20001 ⓾ 410-258-4096 ⓾ jsh162@law.georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, DC**
Juris Doctor — **August 2021- May 2023**
GPA: 3.78/4.0 Cum Laude. Dean's List: Fall 2021-Spring 2022.
Journal: Georgetown Environmental Law Review: Executive Editor
Activities: Asian Pacific American Law Students Association. Transfer Students Association.
Honors: Section 6 Graduation Commencement Speaker. Highest Grade: Mergers & Acquisitions.

UNIVERSITY OF CONNECTICUT SCHOOL OF LAW — **Hartford, CT**
First-year J.D. coursework completed — **August 2020- May 2021**
GPA: 3.645/4.00 (12/135/Top 9%)
Activities: Asian Pacific American Law Students Association: 1L Representative. Club Soccer.

TOWSON UNIVERSITY — **Towson, MD**
Bachelor of Science, Political Science and Communication Studies Minor: Business Administration — **May 2020**
Honors: Dean's List: Fall 2017, Spring 2018, Fall 2018, Spring 2019, Fall 2019, Spring 2020
Activities: Study Abroad: Corporate Communication in the UK. Pre-Law Society: Treasurer. Kappa Delta Rho: Fundraising Chair. Club Lacrosse. Tigers Toastmasters. Future Business Leaders of America: Social Media Coordinator.

EXPERIENCE

Bankruptcy Practicum — **Washington, DC**
Student Researcher — **January 2023- Present**
- Researched court cases regarding the use of the "Texas Two Step" and Bad Faith.
- Assisted preparing an amicus brief for future Supreme Court appellate litigation.
- Worked with students to draft memos relating to bankruptcy appellate litigation.

Dentons US LLP — **New York, NY**
Summer Associate — **June 2022- Aug 2023**
- Conducted research regarding preliminary procedural issues in high level complex litigation.
- Created signatory pages and provided assistance in closing transactions.
- Represented client in Pro-Bono representation through U-Adjustment Process.

Brenner, Saltzman, & Wallman — **New Haven, CT**
Summer Associate — **June 2021–Present**
- Conducted legal research on diverse legal matters involving divorce, employment, and housing disputes.
- Drafted motions to strike in response to complaints filed by plaintiffs.
- Assisted settlement conferences with opposing counsel.
- Researched and Conducted legal analysis involving complex corporate legal issues.

Georgetown Environmental Law Review — **Washington, DC**
Executive Editor — **August 2022- Present**
- Provided cite checks for student notes and author submissions in accordance with bluebook requirements.
- Communicated with authors regarding substantive line edits and structural changes.
- Researched relevant legal issues regarding the environment and securities regulation.

Office of the Public Defender — **Towson, MD**
Legal Intern — **January 2019 – June 2019**
- Conducted legal research and drafted office memoranda.
- Prepared and drafted legal documents for trial.
- Reviewed and outlined video and audio tapes.
- Attended court with trial attorneys to witness hearings, trials, and judgements.

Relevant Coursework

- Procedural Coursework: Federal Courts, Evidence, Criminal Procedure, Administrative Law, Legislation and Regulation, Statutory Interpretation
- Corporate Coursework: Corporations, Securities Regulation, Mergers & Acquisitions, Bankruptcy Law
- Labor and Employment Coursework: Employment Discrimination, Employment Law, Labor Law

Record of: Jonathan S. Hong
GUID: 801271066

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 07, 2023
Georgetown University Law Center
Major: Law
Honors: Cum Laude

Transfer Credit:
University of Connecticut
School Total: 31.00

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	121	02	Corporations Robert Thompson	4.00	A	16.00	
LAWJ	146	08	Environmental Law Lisa Heinzerling	3.00	P	0.00	
LAWJ	150	05	Employment Discrimination Jamillah Williams	3.00	A-	11.01	
LAWJ	1526	05	The Law of Autonomous Vehicles Edward Walters	2.00	B+	6.66	
LAWJ	1617	08	Entrepreneurship: The Lifecycle of a Business David Fogel	2.00	A	8.00	

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	41.67	3.79
Cumulative	45.00	11.00	41.67	3.79

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	128	08	Criminal Procedure Abbe Lowell	2.00	B+	6.66	
LAWJ	1468	05	Business and Financial Basics for Lawyers Brian Sawers	2.00	P	0.00	
LAWJ	263	09	Employment Law Jamillah Williams	3.00	A	12.00	
LAWJ	361	08	Professional Responsibility Elaine Block	2.00	A	8.00	
LAWJ	396	05	Securities Regulation Donald Langevoort	4.00	A	16.00	

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	13.00	11.00	42.66	3.88
Annual	27.00	22.00	84.33	3.83
Cumulative	58.00	22.00	84.33	3.83

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	025	05	Administrative Law Anita Krishnakumar	3.00	A	12.00	
LAWJ	165	02	Evidence Michael Pardo	4.00	B+	13.32	
LAWJ	1782	05	Statutory Interpretation Theory Seminar Anita Krishnakumar	3.00	A-	11.01	
LAWJ	264	05	Labor Law: Union Organizing, Collective Bargaining, and Unfair Labor Practices Brishen Rogers	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	48.33	3.72
Cumulative	71.00	35.00	132.66	3.79

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	054	08	Bankruptcy Law	2.00	A-	7.34	
LAWJ	1316	05	Bankruptcy Advocacy	4.00	B+	13.32	
LAWJ	1447	08	Mediation Advocacy Seminar	2.00	A-	7.34	
LAWJ	178	05	Federal Courts and the Federal System	3.00	P	0.00	
LAWJ	434	08	Mergers and Acquisitions	3.00	A+	12.99	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	40.99	3.73
Annual	27.00	24.00	89.32	3.72
Cumulative	85.00	46.00	173.65	3.78

End of Juris Doctor Record

University of Connecticut

Unofficial Transcript

Name: **Jonathan Hong**
Student ID: **2920553**

Print Date: 06/28/2021

End of Unofficial Transcript

Beginning of Law Record

Fall 2020 (**2020-08-31** - **2020-12-22**)
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7500	Civil Procedure	4.00	4.00	B+	13.200
LAW	7505	Contracts	4.00	4.00	A-	14.800
LAW	7510	Criminal Law	3.00	3.00	A	12.000
LAW	7518	Lgl Practice: Rsrch & Writing	3.00	3.00	A	12.000
LAW	7530	Torts	3.00	3.00	A-	11.100

			Attempted	Earned	GPA Units	Points
Semester GPA	3.712	Semester Totals	17.00	17.00	17.00	63.100
Cumulative GPA	3.712	Cumulative Totals	17.00	17.00	17.00	63.100

Spring2021
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7519	Lgl Practice: Negotiation	1.00	1.00	P	0.000
LAW	7520	Lgl Practice: Intrv,Cnsl & Adv	3.00	3.00	B+	9.900
LAW	7525	Property	4.00	4.00	B	12.000
LAW	7540	Constitutional Law, An Intro	4.00	4.00	A	16.000
LAW	7987	Legislation and Regulation	3.00	3.00	A	12.000

Class rank: 1st Quintile (12/135)

			Attempted	Earned	GPA Units	Points
Semester GPA	3.564	Semester Totals	15.00	15.00	14.00	49.900
Cumulative GPA	3.645	Cumulative Totals	32.00	32.00	31.00	113.000

Fall 2021 (**2021-08-30** - **2021-12-21**)
Program: Juris Doctor 3 Yr. Day
Plan: Three Year Day Division Major

Course		Description	Attempted Credits	Earned Credits	Grade	Grade Points
LAW	7554	Compliance: Legal Perspective	3.00	0.00		0.000
LAW	7650	Environmental Law	3.00	0.00		0.000
LAW	7661	Federal Income Tax	3.00	0.00		0.000
LAW	7806	Renewable Energy Law	3.00	0.00		0.000
LAW	7980	Unfair/Deceptive Trade Prac	3.00	0.00		0.000

			Attempted	Earned	GPA Units	Points
Semester GPA	0.000	Semester Totals	15.00	0.00	0.00	0.000
Cumulative GPA	3.645	Cumulative Totals	47.00	32.00	31.00	113.000

Law Career Totals

Cumulative GPA	3.645	Cumulative Totals	47.00	32.00	31.00	113.000

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write to urge your consideration of Jonathan Hong as a clerk in your chambers. He was a student in my corporations class last fall and mergers in the spring. They were large classes (about 115 in the fall and 70 in the spring). In the merger class his exam was one of two that separated themselves from the A group by a large margin resulting in an A+ grade for the course. In the corporations class, the exam was also well done and very complete, earning an A which put it in the top group of papers outside of the top 1%.

I would add two more things if it might be helpful. I had not initially picked him out in class as someone whose performance might be distinctive. It was at the end of the semester in a couple of office hour sessions where a half dozen students had shown up at the same time for what became a longer discussion that required putting together multiple points from the course. I made a mental note that he got it better than the rest. The second observation is that because I teach a large bar course in the fall semester of students' second year, I tend to get a noticeable number of transfer students, mixed in with those who have been together for first year. That can be an intimidating environment for the outsider that dampens learning and participation. I think he adapted very well in that setting. I encourage you to review his resume and references and to talk to him if you think there might be a fit.

Sincerely,

Robert B. Thompson
Peter P. Weidenbruch Jr. Professor of Law

Robert Thompson - rbt5@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing to recommend Jonathan Hong strongly for a clerkship in your chambers. Jonathan took my Labor Law class in the Fall of 2021. Based on his performance in my classes and our meetings outside of class, I feel well-qualified to assess his abilities and promise as an attorney.

Jonathan's work in my class was outstanding. He was always well-prepared and made insightful contributions to class discussion. Whenever I called on him, he was able to quickly summarize the key doctrine, and to recognize and analyze the nuances in the caselaw. He could also recognize the broader implications of cases, analyzing how they would advance or limit broader employers' legitimate interests in efficient production, or broader social goals such as employee voice and equality. I was unsurprised to learn that his final exam was one of the best in the class, with very strong writing and legal analysis.

As I understand, Jonathan is planning to work at a major law firm after graduation, but later to transition to plaintiff-side work. He may specialize in labor and employment law. As you'll see, his performance in all his classes in that field has been excellent, as has his performance in corporate and securities law. He is hoping to clerk in order to further develop his research, writing, and analytical skills, and also to gain exposure to a broader variety of issue areas within the law.

Jonathan has also had a somewhat unusual educational path, which signals to me that he has taken his education and professional training very seriously. He went to college at Towson University, then attended the University of Connecticut Law School for his 1L year before transferring to Georgetown as a 2L. In my experience, students with similar educational backgrounds who thrive in law school often have a maturity beyond their years, and end up being among the strongest and most diligent attorneys.

Having gotten to know Jonathan outside of class, I can also say that he has strong interpersonal skills. He is quite easy to get along with, thoughtful, and trustworthy. I would not hesitate to recommend him highly to other legal employers, as I expect that those qualities, together with his analytical skills, will make him a very successful attorney and an excellent co-worker.

In short, I strongly recommend Jonathan for a clerkship in your chambers. I believe he would be outstanding in that role. If I can be of assistance in any other way, please do not hesitate to contact me.

Sincerely,

Brishen Rogers
Professor of Law

Brishen Rogers - br553@georgetown.edu - 2023346078

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 20, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

It gives me great pleasure to recommend Jonathan Hong, who has applied to serve as a law clerk in your chambers. Jonathan is bright, reliable, and very thoughtful—an excellent student and person. I believe he would make a great law clerk.

I got to know Jonathan during the 2022-2023 academic year, when he was a student in my Statutory Interpretation Theory seminar and in my Administrative Law class. The seminar had only 22 students and involved a lot of in-class discussion, so I got to know the students quite well. During that class, I spoke regularly with Jonathan in class and supervised a paper he wrote about a proposed SEC rule that would regulate greenhouse gases. In class, Jonathan was a solid contributor who could be counted on to chime in regularly and add value. He was always well-prepared and refreshingly honest in his responses. The paper Jonathan wrote, *An Interpretive Approach to Regulating Greenhouse Emissions through the Securities Laws*, analyzes the SEC's proposed rule and the likelihood that it would be upheld by courts. In the end, it concludes that there are strong textualist and purposivist arguments that the SEC does not have the authority to adopt the proposed rule. It is a very solid, well-researched and analytic paper that provides a deep-dive into an interesting and complicated topic.

Jonathan also was in my large Administrative Law class (100 students) and was well-prepared in that class as well, although I did not get to speak with him as deeply or regularly in that class. In both classes, Jonathan was a strong student who could be counted on to engage with the material and offer meaningful insights.

Beyond his excellence in the classroom, Jonathan is a valued member of the Georgetown Law community. He served as the Executive Editor of the *Georgetown Environmental Law Review*—a time-consuming job—and was active in the Asian Pacific American Law Students Association and the Transfer Students Association.

In short, I believe that Jonathan would make a strong law clerk—he is smart, hard-working, and responsible.

Thank you for considering this recommendation, and please let me know if I can provide any additional information about Jonathan that would assist you.

Sincerely,

Anita S. Krishnakumar
Professor of Law and
Anne Fleming Research Professor
anita.krishnakumar@georgetown.edu
(917) 592-4561

Writing Sample Description

The following writing sample is an Amicus Brief Draft Section written during my Bankruptcy Advocacy Practicum. The brief is my own work and has not been edited by any professors or students. The factual predicate of the brief is based on J&J's recent bankruptcy litigation relating to Talc liabilities. The assignment required independent legal research with minimal feedback.

I. THE FAILURE TO PUT JJCI INTO BANKRUPTCY SUBVERTS MULTIPLE CODE PROVISIONS AND ALLOWS IT TO BENEFIT FROM THE SAFE HAVEN ASPECTS OF THE BANKRUPTCY CODE WITHOUT PROPERLY FILING.

A. JJCI violated 11 U.S.C. § 541 by not submitting its assets to the bankruptcy estate.

JJCI's use of the TBOC is not compatible with § 541 which requires all interests of the debtor to be placed into the bankruptcy process through the bankruptcy "estate." § 541 explicitly defines the estate as comprising "[a]ll interests of the debtor . . . as of the commencement of the case." Here, JJCI did not submit its assets to the bankruptcy court's jurisdiction. Instead, the bad faith filing subjected Old JJCI's talc liabilities to bankruptcy while excluding access to JJCI's operational assets. Therefore, JJCI's use of LTL allowed it to subvert the Code's requirements under § 541. This filing directly conflicts with § 541 by enabling Old JJCI to avoid submitting all of its interests to the bankruptcy court's jurisdiction.

JJCI is impermissibly benefiting from mandatory bankruptcy consolidation of talc claimants without submitting all their assets to the bankruptcy court's jurisdiction.[1] This use of the Code violates the "basic bankruptcy bargain" of full disclosure of one's financial situation for a discharge of nearly all debts. By refusing to submit its assets to the bankruptcy court's jurisdiction, JJCI is just one example of a "bankruptcy grifter"–an organization that receives the substantive benefits of bankruptcy but takes on a mere fraction of the burdens. Lindsey D. Simon, *Bankruptcy Grifters*, 131 Yale L.J. 1157 (2022). Permitting JJCI's use of

[1] Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J. Forum 960, 995 (2022).

the TBOC would encourage lawlessness under the Code and a consequent diminution of the "basic bankruptcy bargain."

JJCI is impermissibly utilizing the TBOC in order to escape liability from talc claims. JJCI has violated 11 U.S.C. § 502 by placing talc claims against JJCI into bankruptcy through LTL. Pursuant to § 502, the bankruptcy estate is limited to property of and claims against the debtor.[2] In this filing, since LTL is the debtor, J&J is a third-party non-debtor entity. Here, LTL is intentionally adding legal claims to bankruptcy that lie against non-debtor JJCI. This practice permits JJCI to avoid legal liability to claimants who have lost the opportunity to recover directly from JJCI. *Id.* JJCI's use of the TBOC restricts claimants from recovering from responsible parties without subjecting themselves to the necessary disclosure and oversight requirements under the Code. This utilization of the TBOC is fundamentally incompatible with the basic bankruptcy bargain and wrongfully diminishes creditor's rights without adequate protection.

B. JJCI's failure to file impermissibly allows it to avoid the mandatory financial disclosures required by 11 U.S.C. § 521.

By filing LTL for bankruptcy, JJCI avoided providing disclosures that would have helped creditors make informed decisions about the reorganization plan. The Bankruptcy Code imposes strict obligations on debtors to file complete and accurate financial disclosures. *Matter of Bayless,* 78 B.R. 506, 509 (Bankr. S.D. Ohio 1987). Under 11 U.S.C. § 521, debtors are required to provide a schedule of their assets and liabilities, statement of the debtor's financial affairs, and a schedule of their current income and expenditures. By

[2] *Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy" Before the Senate Committee on the Judiciary, Subcommittee on Federal Courts, Oversight, Agency Action and Federal Rights*, (Written Testimony of Hon. Judith Klaswick Fitzgerald (Ret.) 1, 10.

providing these statements, creditors are given access to pertinent information and allowed to adequately examine the debtor. JJCI was able to completely bypass this process by filing a "surrogate" debtor (LTL) with no legitimate assets, business operations, or employees. Permitting this practice conflicts with the Code's fundamental disclosure policies.

JJCI's use of the TBOC, allows them to avoid necessary public accountability which encourages future tortious conduct. § 521 imposes strict obligations on the debtor to provide creditors with complete and accurate information. Judge Fitzgerald accurately states that failing to file JJCI "affords an escape from accountability by the entities who are responsible for the harms caused and able to pay for them." If JJCI were to file for bankruptcy, § 521 would require providing the public with substantive financial information. Instead, JJCI is able to avoid this by subjecting LTL to bankruptcy. By avoiding filing, JJCI is escaping public scrutiny by not disclosing information about their tort claims and business operations. This allows JJCI to avoid the price of reputational injury that normally accompanies a bankruptcy filing. JJCI should not be permitted to avoid liability and accountability through its bad faith utilization of the TBOC.

JJCI is impermissibly avoiding compliance with periodic reporting obligations under 11 U.S.C. § 1106. JJCI's use of the TBOC is incompatible with complying with their duties as debtors in possession under § 1106. 11 U.S.C. § 1107 requires debtors in possession to have the same duties as trustees per § 1106. Therefore, § 1106 requires debtors to furnish information concerning the estate and to provide periodic reports of their business operations in accordance with 11 U.S.C. § 704. This provision establishes a duty on the debtor to provide creditors with information on request. The duty enhances creditors' ability to examine the debtor and obtain information to assist them in making informed decisions. Once again, JJCI is avoiding complying with future disclosures by filing LTL into bankruptcy. JJCI is intentionally utilizing the TBOC in order to avoid their otherwise statutorily mandated

duties under the code. This practice is inconsistent with the duties of debtors under § 1106 and cannot be permitted by this court.

C. JJCI is impermissibly avoiding its obligations to provide creditors the opportunity to orally examine the debtor under 11 U.S.C. § 341.

By filing LTL for bankruptcy, JJCI was not required to attend a § 341 meeting and therefore, subverted creditor's ability to question the debtor about its financial affairs. 11 U.S.C. § 343 requires the debtor to attend a § 341 meeting that provides creditors the opportunity to examine the debtor. § 341 mandates a meeting of creditors which permits the Trustee and creditors an opportunity to question the debtor and obtain information about the bankruptcy. This provision guarantees an opportunity for creditors to ask the debtors questions on the record. Simon, *Bankruptcy Grifters*, *supra*, at 1209. JJCI has impermissibly bypassed this meeting requirement by filing LTL for bankruptcy. In doing so, creditors have been stripped of an opportunity to examine JJCI and ask questions about its financial affairs and liabilities. The ability to bypass a § 341 meeting provides a perverse incentive for debtors to utilize the TBOC to avoid providing disclosures or an opportunity to examine the affairs of the debtor. This practice is incompatible with the "basic bankruptcy bargain" as it inequitably prohibits creditors from adequately examining the debtor.

Allowing JJCI to avoid their § 341 meeting directly conflicts with the purposes of § 341– to provide creditors the opportunity to examine the debtor concerning its assets and financial affairs. 11 U.S.C. § 343. Specifically, the examination can lead to the recovery of assets for the estate, grounds to challenge the discharge of the debtor, and other relevant information to the administration of the bankruptcy estate. *In re Ladner*, 156 B.R. 664, 665 (Bankr. D. Colo. 1993). Attending the meeting is one of the most important responsibilities

for debtors in order for debtors to obtain the benefits of discharge. *Id*. The meeting is considered so important that many courts have held that the debtor's presence is mandatory with no exceptions. *In re Chandler*, 66 B.R. 334, 335 (N.D. Ga. 1986).

In practice, the § 341 meeting can provide information that leads to a denial of discharge based on inadequate disclosures. *In Re Corona*, No. 08-15924 (DHS), 2010 WL 1382122. 1, 11 (D.N.J. Apr. 5, 2010). In *Corona*, the court found that the debtor acted with reckless indifference to the truth of their initial financial disclosures and the statements they made during the § 341 meeting. JJCI's use of the TBOC allows the avoidance of the statutory check provided under § 341. This outcome gives debtors the ability to provide inadequate financial disclosures while leaving creditors without the opportunity to examine their affairs. Such a result is incompatible with the "basic bankruptcy bargain" which requires full disclosure in exchange for the benefits of discharge.

D. JJCI's failure to file avoids compliance with 11 U.S.C. § 363 because creditors are stripped of an opportunity for notice and hearing for non-ordinary course transactions.

JJCI's filing is impermissible because it enables them to conduct non-ordinary course transactions without obtaining advance court approval or providing creditors with an opportunity for notice and hearing. Under § 363(b)(1), non-ordinary course transactions require advance court approval and the opportunity for notice and hearing. § 363(b)(1) is meant to ensure that the full value of the business is available to creditors' claims. § 363(b)(1) ensures this by providing creditors an opportunity for notice and hearing regarding non-ordinary course transactions. By having LTL file, JJCI is free from their statutory obligations to provide creditors with an opportunity for notice and hearing before they

conduct non-ordinary course transactions. Court approval is required in order to provide scrutiny from creditors to ensure that they receive full value from debtor entities. Brubaker, *Legitimacy*, *supra*, at 5. As a result, JJCI is bypassing § 363 requirements as creditors will be unable to scrutinize the transactions without notice and a hearing. This outcome directly subverts creditor's rights while permitting the debtor to avoid ensuring that the full value of the business is available to claims. Permitting this outcome would promote lawlessness under the Code, as JJCI would be rewarded for avoiding Code requirements that make up the "basic bankruptcy bargain."

Courts have construed the purpose of § 363 to permit businesses to continue operation while protecting creditors from the dissipation of the estate's assets. *In re Dant & Russell, Inc.*, 67 B.R. 360, 363 (D. Or. 1986) (*citing* H.R. Rep. No. 595, 95th Cong., 1st Sess. 181-82 (1977). The underlying purpose of § 363 would be frustrated if debtors were permitted to avoid notice and hearing through their use of the TBOC. Specifically, debtors could use this loophole to avoid scrutiny for non-ordinary course transactions that shield their assets from creditors. The Supreme Court has held that "the debtor, though left in possession . . . does not operate [the business], as it did before the filing of the petition, unfettered and without restraint." *Case v. Los Angeles Lumber Prod. Co.*, 308 U.S. 106, 125 (1939). Allowing JJCI's use of the TBOC unjustly allows JJCI to operate unfettered and without restraint and is thereby incompatible with the Code's fundamental policy of oversight.

Writing Sample Description

The following writing sample is a brief written during my Legal Research and Writing Course. The brief is my own work and has not been edited by any professors or students. The factual predicate of the brief is based on the killing of Atatiana Jefferson in 2019. While given facts by our Legal Writing Professor, the assignment required independent legal research with minimal feedback.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Alexandra Jackson was a loving daughter, aunt, and sister who had just graduated from New York University with a degree in biology. On October 12th, 2019 Alexandra Jackson was shot and killed by former police officer Green. Alexandra Jackson was playing video games with her nephew when she heard suspicious sounds at 2:30 at night. For the protection of her nephew, Alexandra retrieved her legally owned pistol and went to see what was causing the sounds. At the window, Alexandra had heard a man's voice but could not discern what he was saying. Alexandra was shot and killed a split second later. **At the moment of the fatal shooting, Ms. Jackson was not committing a crime and did not pose an immediate threat to officer Green. When Green shot Ms. Jackson, he did not know whether Ms. Jackson was holding a pistol.**

Under 42 USC § 1983 (Section 1983), police officers can be given qualified immunity from their actions unless they violate clearly established law. Clearly established law is not required to be fundamentally similar to the case in question. When an officer's conduct would not be found as reasonable to any officer, exact precedent is not required to violate clearly established law. Under Section 1983, officers can be held liable when their use of excessive force is objectively unreasonable. ***In fact, case law is clear that when an officer has no reason to believe that an individual poses an immediate threat, deadly force is objectively unreasonable.*** A finding contrary to this would allow police officers to escape liability when using deadly force against civilians, only because there is no federal law directly on point. This is not applicable law.

Therefore, the Jackson estate respectfully requests the court to deny Green's motion for summary judgement and requests the court grant a continuance under Federal Rule of Civil Procedure 56(d). (Rule 56)

II. STATEMENT OF FACTS

A. Ms. Jackson's Professional Success and Family Devotion Before the Fatal Shooting.

After graduating from NYU with a degree in biology, Ms. Jackson worked as a pharmaceutical sales representative in the Staten Island area. Declaration of Victoria Jackson (the "Jackson Decl.") ¶ 3. Ms. Jackson was a devoted sister, aunt, and daughter who had no criminal history. Id. Ms. Jackson recently moved back in with her mother to care for her as she struggled with health difficulties. Jackson Decl., ¶ 2. When not working, Alexandra enjoyed playing video games with her nephew Elijah sometimes until 2:30 at night. Jackson Decl., ¶ 5.

B. Ms. Jackson was Playing Video Games With Elijah When a Non-Emergency 911 Welfare Call was Made By Her Neighbor.

On the night of her death, Ms. Jackson was playing video games with her nephew Elijah. Jackson Decl., ¶ 4. Ms. Jackson left the door open to let cool air into the apartment. Id. John James, Jackson's neighbor made a non-emergency 911 welfare call after seeing the door opened for an extended period of time. Jackson Decl., ¶ 9. James did not mention any possible suspicious or dangerous activity. Id. James stated that he had no reason to suspect a break in or any criminal activity and was only worried that the door was open so late at night. Jackson Decl., ¶ 10.

C. Ms. Jackson's Response to Hearing Suspicious Sounds in her Backyard at 2:30 at Night.

After hearing suspicious sounds in the backyard at 2:30 at night, Ms. Jackson decided to investigate. Jackson Decl., ¶ 7. Out of an abundance of caution, Ms. Jackson picked up her legally

owned pistol. Jackson Decl., ¶ 5. As a young woman, Ms. Jackson owned a pistol for protective purposes. Id. Reasonably, Ms. Jackson felt threatened fearing that someone could be lurking in her backyard so late at night. Declaration of Elle Kraft (the "Kraft Decl.") ¶11. Ms. Jackson was alone with her 8-year-old nephew, and for protection told him to stay put while she investigated. Jackson Decl., ¶ 7.

D. When Responding to the Non-Emergency 911 Call, Green Never Identified Himself as a Police Officer.

Green was under the impression that he was responding to an open-structure call. Kraft Decl., ¶ 3. Responding to an open structure call allows for a response based on the impression the officer forms at the scene. Kraft Decl., ¶ 13. While the officers noticed that the front door was open, there were no signs of breaking and entering or any criminal activity. Kraft Decl., ¶ 14. In addition, lights were on in the front and inside of the house. Jackson Decl., ¶ 17. Instead of identifying himself as a police officer, Green left and went to the backyard. Jackson Decl., ¶ 12. After seeing Ms. Jackson through the window, Green still did not identify himself as a police officer. Jackson Decl., ¶ 15.

E. Before Shooting and Killing Alexandra, Green Did Not Warn Alexandra that he Would Shoot and did Not Give her an Opportunity to Respond to His Directives.

After seeing Alexandra through the window, Green yelled at Alexandra to "put your hands up show me your hands". Jackson Decl., ¶ 15. Alexandra could not hear or see the officer clearly. Jackson Decl., ¶ 7. A split second after this directive, Green shot and killed Alexandra as her nephew Elijah hopelessly watched. Id. It was only a few seconds after seeing Alexandra that Green utilized deadly force against her. Jackson Decl., ¶ 16. Green did not identify himself as a police officer and did not warn Alexandra that he would shoot her. Id.

F. At the Time Green Shot and Killed Alexandra, Green Did Not Know Whether or Not Alexandra was Holding a Pistol.

Green never said that he thought Alexandra was holding a pistol. Jackson Decl., ¶ 15. Incident-reconstruction shows that Green could have never known that Alexandra was armed. Id. Jackson Decl., ¶ 17. Green's Partner Darby admitted that he could only see Alexandra's face and did not attest to being able to see a pistol. Kraft Decl., ¶ 19. All that is known is that Green "perceived a threat" prior to the shooting. Kraft Decl., ¶ 3.

G. The New York City Police Department Universally Condemned Green's Actions and Consequent Administrative Action was Taken Against Green.

The New York Police Department universally condemned Green's actions. Kraft Decl., ¶ 16. The chief of police formally apologized to the Jackson Estate for Green's actions. Kraft Decl., ¶ 3. Had Green not resigned, he would have been fired for violating the NYPD's use of force and de-escalation policies. Kraft Decl., ¶ 4. No officer in the police department disagreed with the action taken against Green. Kraft Decl., ¶ 16. Prior to the incident, Green received several poor officer evaluations and was said to have "tunnel vision". Kraft Decl., ¶ 18. Following the incident Green was indicted by a grand jury and his case is expected to go to trial in August 2021. Kraft Decl., ¶ 21.

III. LEGAL STANDARD

Summary judgement is an extreme mechanism that should only be granted in the complete absence of any genuine issue of material fact. Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991). There is only an absence of material fact when based on the evidence, no reasonable jury could rule for the nonmoving party. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249 (1986). Even when there is just a single genuine issue of material fact, Rule 56 (a) requires that summary

judgment not be granted. When deciding to grant summary judgement, the court may not grant summary judgement on issues that turn on witness credibility. Azrielli v. Cohen Law Offices, 21 F.3d 512, 518 (2d Cir. 1994).

The purpose of summary judgement "is not to cut litigants off from their right of trial by jury if they really have issues to try". Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 467 (1962). When granting summary judgement, "The evidence of the non-movant is to be *believed*, and a*ll justifiable inferences are to be drawn in his favor*." Anderson, 477 U.S. at 256. Summary judgement should be granted sparingly in excessive force cases as these cases generally require a jury to decide factual disputes. Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005). The evidence surrounding an officer's excessive use of force "is often susceptible to different interpretations" which makes summary judgement in these cases "often inappropriate". Cyrus v. Town of Mukwonago, 624 F.3d 856, 862 (7th Cir. 2010).

IV. GREEN IS NOT ENTITLED TO SUMMARY JUDGEMENT BECAUSE SHOOTING ALEXANDRA JACKSON WAS OBJECTIVELY UNREASONABLE CONSIDERING THAT HE DID NOT KNOW WHETHER MS. JACKSON WAS ARMED; ADDITIONALLY, GREEN IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE ANY REASONABLE OFFICER KNOWS THAT IT IS UNLAWFUL TO SHOOT SOMEONE WHEN THEY DON'T KNOW IF THE INDIVIDUAL IS ARMED.

Section 1983 provides immunity to police officers for using excessive force unless their conduct is objectively unreasonable, and the conduct violates clearly established law. Graham v. Connor, 490 U.S. 386, 387 (1989). Therefore, determining whether qualified immunity applies in excessive force cases requires a two-step process; first whether the conduct was objectively

reasonable, and second whether the conduct violated "clearly established law". Bacon v. Phelps, 961 F.3d 533, 542 (2d Cir. 2020).

Excessive force can be defined as objectively unreasonable when analyzed by using the "Graham Factors". Graham, 490 U.S. at 396. The Graham factors allow the court to determine the reasonableness of a use of force by considering the totality of the circumstances. Glenn v. Washington Cty., 673 F.3d 864, 872 (9th Cir. 2011). When determining whether force was objectively reasonable, the court may only consider facts that were known to the officer at the time force was used. White v. Pauly, 137 S. Ct. 548, 551 (2017). After this determination, the court must decide whether this use violated clearly established law. Bacon, F.3d at 542. In excessive force cases, clearly established law does not require exactly similar precedent with the situation in question. Fogarty v. Gallegos, 523 F.3d 1147, 1161 (10th Cir. 2008). Specifically, law can be defined as clearly established when every reasonable officer would determine that the conduct was in violation of federal law. Brown v. City of New York, 862 F.3d 182, 190 (2d Cir.

2017).

As set forth below, Green's conduct was objectively unreasonable. Green did not know whether Alexandra Jackson was holding a firearm when he shot and killed her. Jackson Decl., ¶ 15. Green could not see any weapon and there was no evidence of criminal activity. Jackson Decl., ¶ 10. Shooting and killing an individual when you are unaware if they are holding a firearm is objectively unreasonable. Additionally, Green is not entitled to qualified immunity. Every reasonable officer should know that shooting an individual when you are unaware if they are holding a firearm is unlawful. Here, the chief of police and the entire department condemned Green's actions showing that any reasonable officer would find his actions unlawful. Kraft Decl., ¶ 16. Accordingly, Green is not entitled to summary judgment.

A. Green's Conduct was Objectively Unreasonable Under the Graham Factors; Green had No Reason to Perceive an Immediate Threat Because He did Not Know Alexandra was Armed and the Severity of the "Crime" did not warrant deadly force.

Determining whether an officer has used excessive force must be analyzed using the "Graham Factors". Graham, 490 U.S. at 396. These factors include the severity of the crime, whether the suspect poses an immediate threat, and whether the suspect was actively resisting arrest. Id. "The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight". Id. at 398. In other words, the reasonableness of the use of force must be analyzed by considering the circumstances evident when force was used. Id. By not analyzing the totality of the circumstances, the fact that a "person was armed would always end the inquiry". Glenn, 673 F.3d at 872.

Out of the Graham factors, the most important factor is whether the individual "poses an immediate threat to the officer". Glenn, 673 F.3d at 872. Courts have ruled that excessive or deadly force is unreasonable when the officer has no reason to believe that there is an immediate threat. Tennessee v. Garner, 471 U.S. 1, 21 (1985). Specifically, deadly force has been found to be unreasonable when there is no indication that the individual is carrying a weapon. Id. at 3. In Tennessee, 471 U.S. at 4, an individual was shot and killed by a police officer after attempting to jump over a fence to evade police. In this case, the officer had no reason to believe that the individual was armed. Id. at 3. The Supreme court held that an "officer may not seize an unarmed, non-dangerous suspect by shooting him dead". Id. at 11. In determining whether the officer's behavior was reasonable, the court stated how the crime in question did not warrant the use of deadly force.

> "*While we agree that burglary is a serious crime,* ***we cannot agree that it is so dangerous as automatically to justify the use of deadly force***. *Although the armed burglar would present a different situation,* ***the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous***. *In fact, the available statistics demonstrate that burglaries only rarely involve physical violence. During the 10-year period from 1973–1982, only 3.8% of all burglaries involved violent crime*".
>
> *Tennessee*, 471 U.S. at 11

In determining the immediacy of a threat, courts have considered whether the officer ordered the individual to drop their weapon and whether they complied with the officer's commands. Estate of Larsen ex rel. Sturdivan v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008). In utilizing deadly force, it is necessary to provide warning of gun fire when it is "feasible". Reavis estate of Coale v. Frost, 967 F.3d 978, 986 (10th Cir. 2020). It is considered feasible to provide warning when the use of force may result in serious injury or the failure to warn can be considered in analyzing the Graham factors. Deorle v. Rutherford, 272 F.3d 1272, 1284 (9th Cir. 2001). The objective reasonableness of an officer's actions can depend on "whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force". Sevier v. City of Lawrence, 60 F.3d 695, 699 (10th Cir. 1995). Summary judgement can be denied when there is conflicting evidence as to whether an officer's conduct necessitated deadly force by their own actions. Id. at 701. Considering the totality of the circumstances allows the court to determine whether an officer recklessly created the need to use force by failing to identify as police. Thomas v. Durastanti, 607 F.3d 655, 664 (10th Cir. 2010).

The Graham factors also require analysis of the severity of the crime. *Graham*, 490 U.S.

at 396. Courts have held that pointing a gun at someone is excessive when the crime is only a misdemeanor and the suspect was unarmed. Robinson v. Solano Cty., 278 F.3d 1007, 1014 (9th Cir. 2002). In Hopkins v. Bonvicino, 573 F.3d 752, 768 (9th Cir. 2009), an individual was involved in a hit and run incident. After returning home, police officers went into his house to check on his welfare as they believed there may have been a health emergency. Id. at 761. The police entered and pointed their gun at the individual. Id. The court held that this use of force was excessive and the fact that they thought the individual was suffering from a medical emergency suggests that they were aware that the individual did not pose an immediate threat. Id. at 766.

> *"Furthermore, the facts in the record, including the officers' own testimony that their reason for forcefully entering Hopkins' home was that they suspected he was suffering from a medical emergency, suggest that they were fully aware at all times that Hopkins did not pose a threat to anyone.* ***As to the other facts described in Robinson, there is no dispute that the officers here outnumbered Hopkins, that he was unarmed, and that any putative crime the officers might have been investigating was a misdemeanor****".*
>
> Hopkins, 573 F.3d at 777.

Under limited circumstances, courts have justified police officer's use of excessive force when there is a mistaken belief about the immediacy of a threat. Curley v. Klem, 499 F.3d 199, 214 (3d Cir. 2007). In Curley, 499 F.3d at 201, a police officer shot a security guard who he mistook as a suspect. The police officer was told that a suspect was armed and highly dangerous. Id. at 216. The officer saw the security guard with a gun and mistook him as the suspect. Id. at 203. Based on these facts, summary judgment was denied because there were questions of fact regarding whether his mistake justified the use of deadly force. Id. In contrast, even if an officer

believes that an individual is holding a gun, their use of force may not be justified when their belief is unreasonable. Walker v. City of Orem, 451 F.3d 1139, 1160 (10th Cir. 2006).

> "*While Officer Peterson stated that he believed David was pointing a gun at him, this belief was not reasonable, if plaintiff's version of events is accepted, and she is given the benefit of every reasonable inference. The angle of David's hands and the amount of light on the scene should have permitted Officer Peterson to ascertain that he was not holding a gun in a shooting stance".*
>
> Walker, 451 F.3d at 1160.

Here, Green's use of force was objectively unreasonable. Green had no reason to believe that Alexandra posed an immediate threat. Jackson Decl., ¶ 15. As in Graham, 490 U.S. at 396, considering the circumstances evident when force was used, Green had no reason to believe Alexandra posed an immediate threat as he was unaware that Alexandra was holding a pistol. Jackson Decl., ¶ 15. This lack of knowledge renders Alexandra holding a pistol immaterial to Green's perception to the immediacy of a threat. Following Tennessee, 471 U.S. at 11, shooting and killing an individual when you are unaware if they are carrying a weapon cannot be seen as objectively reasonable.

Green was reckless in not identifying himself as a police officer. Thomas, 607 F.3d at 664. As in Sevier, 60 F.3d at 699 Green's reckless conduct unreasonably precipitated his use of force. Here, Alexandra was unaware that Green was a police officer. Jackson Decl., ¶ 7. All Alexandra saw was a suspicious figure lurking around in her backyard in the middle of the night. Id. Had Green announced himself as a police officer, Alexandra would have never needed to grab her pistol for protection. Additionally, Alexandra was never given a meaningful opportunity to follow Green's commands. This was evident as she was shot a split-second after being told to raise her hands. Id. Here, the use of deadly force against an individual would make it feasible to require

a warning of impending gun fire. Deorle 272 F.3d at 1284. Green's reckless lack of identification precipitated his erroneous perception of an immediate threat which made his use of force objectively unreasonable.

Analyzing the severity of the crime further proves that Green's conduct was objectively unreasonable. The officers were called to the house on a non-emergency line to respond to a "welfare call". Jackson Decl., ¶ 9. Even though the officers were also responding to an open structure call, Green had no reason to believe a crime was occurring because there was no evidence of suspicious activity. Id. Courts have ruled that pointing a gun at an individual while investigating them for a misdemeanor is an excessive use of force. Hopkins, 573 F.3d at 768. Here, Alexandra was not committing any crime and was shot and killed. Assuming *arguendo* that Green was reasonable in suspecting that breaking and entering had occurred, this crime does not warrant the use of deadly force. Breaking and entering alone is not inherently dangerous and cannot justify an officer's belief of the immediacy of a threat. Tennessee, 471 U.S. at 21.

Considering the severity of the crime, Green's conduct was clearly not objectively reasonable.

This case is distinguishable from Curley. Unlike Curley, 499 F.3d at 216, where the officer was informed there was a suspect who was armed and highly dangerous, it is not known what Green was told of the situation beforehand. Additionally, Green never saw Alexandra holding a gun which differentiates these two cases. Assuming *arguendo*, that a court could find that Green's mistake was reasonable, there are still questions of fact that would preclude Green from being granted summary judgment. There is evidence that suggests that Green could not have seen a gun and a jury should be allowed to decide whether Green's conduct was objectively reasonable. Jackson Decl., ¶ 15. Accordingly, this court should deny Green's motion for

summary judgement.

B. Green is Not Entitled to Qualified Immunity as a Matter of Law; Green's Perception of the Threat was Unreasonable Because Clearly Established Law Shows Any Reasonable Officer Should Know Not to Shoot Someone When They are Unsure if the Person is Armed.

Qualified immunity protects officers when their conduct does not violate "clearly established law". Pearson v. Callahan, 555 U.S. 223, 243 (2009). However, courts have held that defining "clearly established law" does not require precedent with the precise facts to the incident in question. Fogarty 523 F.3d at 1161. Certain circumstances allow for less specificity regarding case law. Id. "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004). Requiring exact precedent would allow officers to "escape responsibility for most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct". Deorle 272 F.3d at 1275.

Qualified immunity does not provide protection to incompetent police officers who knowingly violate the law. Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011). There are situations where "any reasonable officer should know that such conduct constitutes the use of excessive force" and exact federal law is unnecessary to show a violation of established law. Drummond ex rel. Drummond, 343 F.3d at 1062. Federal law can be defined as "clearly established when every reasonable officer would conclude that there was a violation of federal law". Brown, 862 F.3d at 182. Qualified immunity protections are meant to ensure that officers are given notice that their conduct is unlawful. Hope v. Pelzer, 536 U.S. 730, 739 (2002). Being given notice does not require

precedent with "fundamentally similar" circumstances. Id. at 731. Officers can still be put on notice when "their conduct violates established law even in novel factual circumstances". Id. at 741.

When defining clearly established law in accordance with excessive force, "it does not matter [if] no case [in a particular] court directly addresses the use of a particular weapon; ... an officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury". Garcia v. Dutchess Cty., 43 F. Supp. 3d 281, 297 (S.D.N.Y. 2014). In the 2nd circuit, it is clearly established that officers may not employ the use of a taser against non-threatening suspects. Id. In Soto v. Gaudett, 862 F.3d 148, 160 (2d Cir. 2017), an individual was tased by two officers when they unreasonably suspected that he had a gun. The court held that a jury could look at these facts and find that the officer's conduct was objectively unreasonable. Id. Specifically, the court stated:

> "*Defendants also suggest that Soto may have posed a threat of injury to the Officers because he may have had a gun.* ***But none of the Officers said they observed any sign of a weapon or any gesture by Soto that suggested a weapon***. *In light of this evidence, a rational juror could find that, when Stepniewski and Robinson fired their tasers, Soto had never given any indication of possessing a weapon and was not fleeing.* ***The district court's ruling that the evidence, taken in the light most favorable to the plaintiff, was sufficient to create triable issues relevant to the entitlement of Stepniewski and Robinson to qualified immunity***". Soto, 862 F.3d at 160.

Courts have held that it is objectively unreasonable to shoot an unarmed individual who poses no immediate threat and has not committed a serious crime. Deorle, 272 F.3d at 1286. In

Deorle, an emotionally disturbed individual was behaving erratically outside his apartment. Id. at 1280. With no warning, the officer shot the individual in the face with a shotgun using bean bag rounds which have lethal capabilities. Id. at 1275. The court held that the officer's actions were objectively unreasonable and that the officer was not entitled to qualified immunity. Id. at 1286. Qualified immunity did not apply because no officer could perceive that the exemplified conduct was reasonable. Id. In denying the summary judgement, the court reasoned,

> *"Rutherford's use of force was excessive and the* ***defense of qualified immunity is unavailing****. The degree of force was plainly in excess of the governmental interest at stake. The law was clear that Rutherford's shooting of Deorle was in violation of Deorle's constitutional rights, and* ***there was no reasonable basis for any factual or legal misperception on Rutherford's part: no reasonable officer could have concluded that the force employed was appropriate or lawful****".*
>
> Deorle, 272 F.3d at 1286.

Green is not entitled to qualified immunity. Any reasonable officer would know that Green's conduct was unlawful. Brown, 862 F.3d at 182. Here, the police chief of the NYPD stated that there was "no excuse for Green's actions" and consequently apologized to the Jacksons. Kraft Decl., ¶ 3. Furthermore, Green's conduct has garnered universal condemnation from the police department and no officer believes action should not be taken against him. Kraft Decl., ¶ 16. As in Deorle, 272 F.3d at 1286, qualified immunity will not apply to Green's conduct as no reasonable officer would believe there was a basis for Green's use of force.

As in Soto, 862 F.3d at 160, it is clearly established that it is unlawful to shoot a nonthreatening individual with a taser when you have no reason to think that they possess a weapon. Following Garcia, 43 F. Supp. 3d at 297, the fact that this situation includes a different

weapon does not entitle Green to qualified immunity. Here, Green had no reason to believe that Alexandra possessed a pistol before shooting and killing her. Jackson Decl., ¶ 15. If it is clearly established law that it is unlawful to use a taser against an individual when you are unaware if they have a weapon, then it is unlawful to shoot and kill someone in the same situation.

Following Hope, 536 U.S. at 741, Green was adequately put-on notice for the illegality of his actions. Here, had he not resigned Green would have been fired for violations of the use of force and de-escalation policies. Kraft Decl., ¶ 4. As in Brown, 862 F.3d at 182 any reasonable police officer would conclude that violating departmental policy regarding the use of force would be objectively unreasonable. Additionally, Green was arrested and indicted for the shooting and killing of Alexandra Jackson. Kraft Decl., ¶ 21. Undeniably, any officer is put on notice that using force in a way that is deemed criminal cannot be objectively reasonable.

Accordingly, for all these reasons, this Court should deny Green's motion for summary judgement.

V. THIS COURT SHOULD DENY GREENE'S MOTION AND IF NOT DENY, DEFER THE RULING, BECAUSE GREENE'S MOTION IS IMPETUOUS; GREENE HAS NOT BEEN QUESTIONED TO HIS ACCOUNT OF THE EVENTS AND THE PARTIES HAVE NOT BEEN ABLE TO DISCOVER WHAT GREEN WAS INFORMED OF GOING INTO THE SITUATION.

When a party's motion for summary judgement is unwarranted, the court has three options in accordance with Rule 56 (d). Those options are to (1) deny or defer ruling on the motion, (2) allow the non-moving party "time to obtain affidavits, or declarations or to take discovery", or (3) issue any "other appropriate order". Rule 56 (d) allows non-moving parties to avoid being "railroaded" when the litigation process has not allowed them to adequately research and prepare. Celotex Corp. v. Catrett, 477 U.S. 317, 318 (1986).

Courts are generally reluctant to grant summary judgement until discovery has been completed. Four Star Capital Corp. v. Nynex Corp., 183 F.R.D. 91, 99 (S.D.N.Y. 1997). Summary judgement should be refused whenever the non-moving party has not had the chance to discover information that is critical to their defense. Anderson, 477 U.S. at 257.

Here, assuming arguendo that the court would grant Green's motion for summary judgement, which it should *deny*; the court should grant a deferral in alignment with Rule 56 (d) in order to procure the Jackson estate more time to gather evidence to defeat Green's motion. Specifically, the Jackson Estate would like the opportunity to question Green about the night of the shooting. Green never testified to whether he saw Alexandra holding a gun which would help prove his use of force was objectively unreasonable. Additionally, there are questions related to what the officers were informed of prior to responding to the 911 call which could likewise help prove that Green's conduct was objectively reasonable. Accordingly, this Court should grant the Jackson Estate's motion for a deferral.

VI. CONCLUSION

Accordingly, as there are triable issues of fact as to whether Green is entitled to qualified immunity under Section 1983, Green's motion for summary judgement should be denied. Additionally, the Jackson estate respectfully requests that this court postpone ruling on Green's impetuous motion for summary judgement until the Jackson estate has had an adequate opportunity to conduct discovery and obtain further evidence to oppose the motion.

Respectfully submitted,

By: Jonathan Hong

GRANGER, POTTER & WEASLEY, LLP
ATTORNEYS FOR PLAINTIFF ESTATE OF ALEXANDRA JACKSON

Applicant Details

First Name	**Tara**
Middle Initial	**S.**
Last Name	**Mahesh**
Citizenship Status	**U. S. Citizen**
Email Address	**tas164@georgetown.edu**
Address	**Address** Street **102 Bayani Street** City **Daly City** State/Territory **California** Zip **94014** Country **United States**
Contact Phone Number	**5155090138**

Applicant Education

BA/BS From	**University of California-Berkeley**
Date of BA/BS	**May 2017**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 20, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**American Criminal Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Appellate, Habeas, Immigration, Patent, Pro Se**

Recommenders

Gelpern, Anna
ag1348@law.georgetown.edu
Hashimoto, Erica
eh502@georgetown.edu
Creighton, Sara
sara.creighton@georgetown.edu

References

(1) Sarabeth Westwood,
swestwood@gibsondunn.com, (650) 849-5359; (2) Kim Do,
kim.do@wilmerhale.com, (628) 235-1048

This applicant has certified that all data entered in this profile and any application documents are true and correct.

TARA S. MAHESH
tas164@georgetown.edu | 102 Bayani Street, Daly City, CA 94014 | (515) 509-0138

June 16, 2023

The Honorable P. Casey Pitts
United States District Court, Northern District of California
San Jose Courthouse, 280 South 1st Street, San Jose, CA 95113

Dear Judge Pitts:

I am writing to apply for a clerkship in your chambers for the 2023–2024 term. At Georgetown Law, I have sought opportunities to develop my legal research, writing, and oral advocacy skills. I was selected as a Law Fellow for the Georgetown Law Legal Writing Law Fellows Program and as a Student Attorney for the Appellate Litigation Clinic, where I argued a habeas appeal before the Fourth Circuit. I also served as the Senior Articles Editor for the *American Criminal Law Review*, one of the nation's top-ranking criminal law journals. These experiences have trained me to think and write clearly about nuanced legal questions, which will make me an effective judicial clerk. In addition, working to put myself through college and working prior to law school has instilled a strong work ethic in me. I understand the importance of managing a high volume of work and am confident that I possess the skills and drive necessary to succeed in a demanding clerkship role.

I am deeply committed to providing pro bono legal help to indigent individuals. This dedication is rooted in a fundamental belief that the practice of law should serve as a platform for positive societal change and that everyone, regardless of their circumstances, deserves equitable access to justice. During law school, I had the privilege of contributing to *The Georgetown Law Journal* Annual Review of Criminal Procedure, a federal criminal procedure treatise that serves as a practical aid to prisoners assisting in their own defense or appeal. Outside of law school, I volunteer with Maitri, an organization that aids South Asian victims of domestic violence in the SF Bay Area. Currently, I am working towards my California Evidence Code 1037.1 domestic violence counselor certification. This certification will allow me to further assist survivors by counseling them on their legal options.

I am applying to clerk with you because I believe we share a passion for public service. I also aspire to become a federal prosecutor in the coming years. Under your leadership, I hope to learn how to better interpret, confront, and challenge various areas of law while further developing my legal toolkit.

Enclosed, please find my résumé, law school transcript, and two writing samples. You will separately receive letters of recommendation from the following people:

Professor Erica Hashimoto	Professor Anna Gelpern	Professor Sara Creighton
eh502@georgetown.edu	ag1348@georgetown.edu	sara.creighton@georgetown.edu
(202) 661-6758	(202) 841-3623	(415) 519-5800

Additionally, please see my two legal employer references below:

Sarabeth Westwood	Kim Do
swestwood@gibsondunn.com	kim.do@wilmerhale.com
(650) 849-5359	(628) 235-1048

If there is any other information that would be helpful to you, I would be happy to provide it. Thank you for your consideration.

Respectfully,
Tara S. Mahesh

TARA S. MAHESH

tas164@georgetown.edu | 102 Bayani Street, Daly City, CA 94014 | (515) 509-0138

EDUCATION

Georgetown Law School May 2023
J.D. Candidate

GPA:	3.73 (Top Third)
Honors:	Dean's List (2021–22); Legal Writing Law Fellow (2021–22); Best Legal Writing Appellant Brief (Spring 2021); Best Contracts Exam (Fall 2020); Georgetown Law Merit Scholarship (2020–23)
Journal:	*American Criminal Law Review*, Executive Board Member and Senior Articles Editor
Activities:	RISE Fellow; Women of Color Collective Executive Board Member; Completing California Domestic Violence Counselor Certification; Student Intellectual Property Law Association

University of California, Berkeley May 2017
Bachelor of Arts, *cum laude*, in Political Science, Minor in Public Policy

GPA:	3.77 (Top 20%)
Awards:	U.S. State Department Citizen Diplomacy Action Fund Winner; U.S. State Department Critical Language Scholar for Chinese; Cal Leadership Award
Publication:	*Translating Migration: Multilingual Poems of Movement*, Co-Editor
Activities:	Research Assistant for Berkeley Law Prof. Sean Farhang; Director of Student Legal Clinic; IT Technician and Receptionist (Worked two jobs as a full-time student to pay for college)

EXPERIENCE

Georgetown Law Appellate Litigation Clinic Aug 2022 – May 2023
Student Attorney Washington, DC

- Researched, drafted, and filed opening and reply briefs in Fourth Circuit 28 U.S.C. § 2241 habeas appeal
- Assisted with the briefs and oral argument preparations for other clinic cases before District of Columbia Circuit

Gibson Dunn LLP May 2022 – Aug 2022
Summer Associate (return offer received) Palo Alto, CA

- Conducted legal research for Ninth Circuit appeal concerning evidentiary hearings at criminal sentencing
- Drafted memoranda on a wide array of matters ranging from patent law infringement to deceptive trade practices

Georgetown Law Journal's Annual Review of Criminal Procedure May 2021 – Aug 2021
Pro Bono Research Assistant (100 hours) Remote

- Researched Sixth Amendment circuit law and updated treatise to reflect new case law
- Revised existing text for grammar and Bluebook consistency

Goodwin Procter LLP and Wayfair May 2021 – Aug 2021
Law and Technology 1L Diversity Scholar Redwood City, CA

- Performed legal research for litigation challenging trade secret misappropriation and patent term extension

U.S. Department of Homeland Security, Asylum Division Jan 2020 – Jul 2020
Legal Administrative Specialist San Francisco, CA

- Collaborated with Asylum Officers to adjudicate benefit applications, petitions, and removal actions
- Performed background and security checks using Secret-level security clearance

Iowa State University Sep 2018 – Dec 2019
Course Assistant Ames, IA

- Prepared course materials for five undergraduate courses and managed virtual classroom system

City and County of San Francisco, Public Works Aug 2017 – Aug 2018
San Francisco Fellow San Francisco, CA

- Analyzed performance data of 10 Public Works programs and reported recommendations to agency leadership
- Built data-visualization dashboards using Tableau and Excel

INTERESTS

Dog mom to non-golden, non-retrieving golden retriever, watching stand-up comedy, cooking with my Instant Pot

Record of: Tara Sivaskandan Mahesh
GUID: 839860736

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	51	Civil Procedure	4.00	B	12.00	
			David Vladeck				
LAWJ	002	52	Contracts	4.00	A	16.00	
			Anna Gelpern				
LAWJ	003	51	Criminal Justice	4.00	B	12.00	
			Roger Fairfax				
LAWJ	005	52	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			Susan McMahon				

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	40.00	3.33
Cumulative	12.00	12.00	40.00	3.33

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	004	51	Constitutional Law I: The Federal System	3.00	B+	9.99	
			Brad Snyder				
LAWJ	005	52	Legal Practice: Writing and Analysis	4.00	A	16.00	
			Susan McMahon				
LAWJ	007	95	Property	4.00	A	16.00	
			Andrew Gilden				
LAWJ	008	51	Torts	4.00	A-	14.68	
			Mary DeRosa				
LAWJ	304	51	Legislation	3.00	B+	9.99	
			Caroline Fredrickson				

	EHrs	QHrs	QPts	GPA
Current	18.00	18.00	66.66	3.70
Annual	30.00	30.00	106.66	3.56
Cumulative	30.00	30.00	106.66	3.56

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	110	08	Copyright Law	3.00	A	12.00	
			Julie Cohen				
LAWJ	165	07	Evidence	4.00	A	16.00	
			Gerald Fisher				
LAWJ	536	22	Legal Writing Seminar: Theory and Practice for Law Fellows	3.00	A	12.00	
			Sara Creighton				

	EHrs	QHrs	QPts	GPA
Current	10.00	10.00	40.00	4.00
Cumulative	40.00	40.00	146.66	3.67

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	193	08	Federal Banking Regulation: Modern Financial Institutions and Change	4.00	A	16.00	
			Anna Gelpern				
LAWJ	317	97	Negotiations Seminar	3.00	A-	11.01	
LAWJ	361	05	Professional Responsibility	2.00	B+	6.66	
			Stuart Teicher				
LAWJ	433	07	Trademark and Unfair Competition Law	3.00	A-	11.01	
			Peter Willsey				
LAWJ	536	22	Legal Writing Seminar: Theory and Practice for Law Fellows	3.00	A	12.00	
			Sara Creighton				

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	56.68	3.78
Annual	25.00	25.00	96.68	3.87
Cumulative	55.00	55.00	203.34	3.70

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	121	07	Corporations	4.00	A	16.00	
LAWJ	178	07	Federal Courts and the Federal System	3.00	A-	11.01	
LAWJ	332	05	Patent Law	3.00	A	12.00	
LAWJ	504	06	Appellate Litigation Clinic		NG		
LAWJ	504	82	Legal Research, Analysis and Writing	2.00	IP	0.00	
LAWJ	504	83	~Collaborative Initiative	1.00	IP	0.00	
LAWJ	504	84	~Oral Advocacy	1.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	10.00	10.00	39.01	3.90
Cumulative	65.00	65.00	242.35	3.73

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	504	06	Appellate Litigation Clinic	5.00	NR	0.00	
In Progress:							
LAWJ	1606	09	Motherhood and the Law Seminar	3.00	In Progress		
LAWJ	215	07	Constitutional Law II: Individual Rights and Liberties	4.00	In Progress		
LAWJ	455	01	Federal White Collar Crime	4.00	In Progress		

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	0.00	0.00	0.00	0.00
Annual	10.00	10.00	39.01	3.90
Cumulative	65.00	65.00	242.35	3.73

End of Juris Doctor Record

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 16, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I feel privileged to be writing this letter for Tara Mahesh. She is extraordinarily bright, gracious, and empathetic; a dogged researcher and a delightful colleague. Her work is meticulous—but also creative and joyful. Having Tara in two of my doctrinal classes was among the best teaching experiences I have had. I have no doubt that she would make an excellent clerk.

My acquaintance with Tara began with first-year Contracts on zoom. To make up for the suboptimal learning conditions, I supplemented the usual exam course with quizzes, problem sets, and extra office hours. Tara stood out for her deep engagement with the material. She read deeply, practiced constantly, asked excellent, purposeful questions, and took advantage of every possible opportunity to learn. Her quiz marks reflected this, jumping sharply after the first assignment, and increasing throughout the term. More importantly for all of us, Tara had a way of radiating excitement at decoding doctrinal puzzles, at uncovering new layers of meaning, at fashioning new tools to fight entrenched injustices. She made zoom school worth the extra effort.

Tara had to manage more pandemic study obstacles than most. Her mom was a frontline healthcare worker, and family health challenges loomed large. There were days when she was visibly worried about her family, and likely had trouble concentrating. Yet she kept bouncing back, re-centering, and re-engaging with remarkable grit and poise. I was thrilled, though not surprised, when I found out that Tara had written the best exam in her section.

I was both thrilled and surprised to meet Tara in person in my financial institutions class last spring. I did not think she had an abiding interest in the subject, and I doubted the efficacy of my sales pitch for banking as civics. The material is exceptionally hard and awkwardly sequenced at times. It demands intense effort throughout the term, particularly from a student with no prior background in finance. Midway through, Tara also fell ill with COVID, and I got worried about her ability to keep up—but I should not have. Tara's organization, her analytical skills, and her customary insistence on digging deeper until she mastered the material from every angle, helped her build up a cushion, so that taking time off to recuperate did not set her back far, if at all. She got an A for the course.

Two things stood out for me in Tara's outlook and performance in Financial Institutions. First, she is eager to take on a big academic challenge, and has the skills to master it. She worked through all the practice problems, did extra assignments, and integrated different aspects of the course brilliantly and with exceptional care. Second and related, she is deeply thoughtful and generous. I personally benefited from her insights about course design, and have implemented some of them this year. More importantly, she helped her classmates when she posted helpful problem notes on the Discussion Board, designed visual aids, and took risks volunteering in class, always prepared but also willing to be wrong, so that everyone could learn.

At every turn in her personal, academic and professional life, Tara has found creative ways to learn, to help, and to advance the cause of justice. A clerkship would deepen her understanding of the judiciary, take full advantage of her writing and analytical skills, and open up new service possibilities.

In sum, Tara Mahesh is a superb student and a wonderful human being. She is making the world a kinder, smarter, fairer place, and is only just beginning. I have no doubt that she would make a fabulous clerk. I am grateful for the chance to recommend her.

Please do not hesitate to contact me at (202) 841-3623 (mobile) or ag1348@georgetown.edu with any questions or concerns.

Sincerely,

Anna Gelpern
Scott K. Ginsburg Professor of Law

Georgetown Law
Appellate Litigation Program
600 New Jersey Avenue, NW
Washington, DC 20001

June 16, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I write to enthusiastically recommend Tara Mahesh for a judicial clerkship. After spending a year working closely with her in my Appellate Litigation Clinic during the 2022–2023 academic year, I came away incredibly impressed with her tireless work ethic, her skill at navigating and writing about complicated legal issues, and her graciousness in collaboration. Tara's ability to think through complex legal issues in a clear, insightful, and fair-minded way made her a star even within a group of exceptionally talented peers in the clinic. But she is also deeply driven to do whatever needs to be done because she understands the human stakes of legal decisions. In short, she appreciates the gravity of the court's role. That willingness to do whatever needs to be done, combined with Tara's terrific research and writing skills, give me the highest confidence that she would be an excellent clerk.

The Appellate Litigation Clinic is a two-semester clinic for third-year law students that accepts appointments to appellate cases from the United States Courts of Appeals for the D.C., Fourth, and Eleventh Circuits. Working in teams, students participate in all aspects of appellate litigation, including litigation strategy, case research, brief drafting, and oral argument. Alongside the casework, students participate in a weekly seminar to develop their advocacy skills. Because I closely supervise students throughout their work, I learn a lot about their work habits and the quality of the work they are capable of producing.

Tara worked on a team briefing a case before the United States Court of Appeals for the Fourth Circuit, and she quickly established herself as the go-to person who was happy to take on any task, no matter how difficult or time-consuming. We were appointed by the Fourth Circuit as amicus curiae in support of a pro se 28 U.S.C. § 2241 habeas petitioner challenging his continued civil commitment. Tara, along with another student, researched the constitutionality of the petitioner's confinement, and she also extensively researched whether he needed to exhaust remedies on that claim. Her research on both issues was comprehensive and exhaustive. The first issue was hard because there were no cases addressing the issue petitioner raised. Tara worked incredibly hard, and found all of the relevant cases on that issue. But when her case partner expressed a preference for briefing that issue, she dove into briefing exhaustion.

Tara's work on the opening brief was terrific. Because exhaustion requirements span across so many areas of law, Tara had to master not only § 2241 habeas exhaustion but also exhaustion in other areas like administrative law. That challenge did not faze her in the least. She dove in and came up with multiple arguments that the exhaustion requirement did not bar petitioner's claim. Once she had mastered the law, she turned to drafting, and it was during that process that Tara demonstrated her good judgment and willingness to embrace feedback. She had devoted a lot of time and work developing multiple lines of argument. In her first draft, she included them all in great detail. When I told her that we really needed to pare her section back to our strongest arguments and make them as cleanly as possible, she took on that challenge with enthusiasm. It can be difficult to part with one's own work, particularly when a great deal of time and effort have gone into the research and drafting. But Tara was as diligent about undertaking the editing process as she had been formulating the arguments. In the end, that section of the opening brief was not long, but it made a very persuasive argument. And because Tara edited that section of the brief so quickly, she took on drafting most of the statement of the case. In doing so, she needed to learn the record for all of the issues we were briefing, and she was meticulous about ensuring that the statement included all of the facts and procedural history we needed in a readable way.

It was during the reply brief drafting process, though, that I realized how much Tara had learned during the opening brief drafting process. The timeline for a reply is, of course, much more compressed, and she hit the ground running. She understood the flaw in the government's exhaustion arguments because she was so knowledgeable about the area of law, and she also had fully embraced the idea that less is more. Her first draft of the exhaustion section was terrific and needed little editing. And because one of her teammates needed some help with a new argument that the government had made, Tara took on that part of the brief, quickly learning the law in that area and drafting a terrific response. All of this demonstrates to me that Tara is not only a very skilled researcher and writer, but she is always hungry to learn more. It makes her an absolute gem to supervise.

I also cannot emphasize Tara's generosity to everyone around her. No matter what needed to get done or how time-consuming it was, Tara always volunteered. Drafting the statement of the case in the opening brief and the new section of the reply brief are two examples. But she was always the first to volunteer for thankless (but necessary) tasks like doing the tables and cite-checking large sections of the brief. And whenever we needed a volunteer to read other teams' draft briefs, Tara was always the first to volunteer. Her classmates continually talked about her warmth and generosity. I am sure that much of that comes very naturally to Tara, but she has also spent much of her life ensuring that things get done for others. To give just one example, Tara's older

Erica Hashimoto - eh502@georgetown.edu

sister was born with a rare genetic disorder that requires lifelong medical care. Because her parents had to work long hours to try to cover the medical bills, Tara grew up helping care for her sister, and she has shared that her interest in going to law school stemmed from her battles with the College Board, which had denied her sister an accommodation for the SAT. A freshman in high school at the time, Tara encouraged her sister and parents to appeal, and she eventually got the accommodations that her sister needed so that her sister could go to college. That determination and generosity is evident in everything Tara does.

In short, Tara is not only a highly skilled and hard-working lawyer, but also a wonderful human being. She would make any judicial chambers a better place. Please feel free to contact me if you need any additional information. Thank you.

Best regards,

Erica J. Hashimoto
Professor of Law and Program Director

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 16, 2023

The Honorable P. Casey Pitts
Robert F. Peckham Federal Building & United States Courthouse
280 South 1st Street, Room 2112
San Jose, CA 95113

Dear Judge Pitts:

I am writing in strong support of Tara Mahesh, Georgetown Law ’23, who has applied for a clerkship in your chambers. Tara is an excellent writer and a hard-working and empathetic student who would be an excellent addition to any judicial chambers.

I got to know Tara very well during her 2L year, when she served as one of my teaching assistants (or “law fellows”) helping with the first-year research and writing course. In that role, Tara helped give feedback and support to the first-year students and also participated in a seminar on legal writing pedagogy. Based on my year working closely with her on a regular basis, I can assure you that Tara has all of the qualities of a strong judicial law clerk.

As a foundational matter, Tara’s legal analytical skills are top-notch. Tara was selected to serve as a law fellow from a very competitive field based on her stellar performance in her own first-year research and writing course. At the start of our year together, I asked each of my law fellows to write a draft of an office memorandum on the same problem the first-year students would be asked to analyze. Tara’s analysis was clear, concise, and well-organized—everything a writing professor could ask for. The final document she submitted to me at the end of the year—a bench memorandum on the same topic the 1L students were briefing—was equally strong, demonstrating sophisticated, well-organized, and well-reasoned analysis.

Tara’s strong analytical skills also enable her to evaluate the strengths and weaknesses in other people’s writing as well. As a law fellow, Tara was responsible for diagnosing her students’ writing and providing written feedback to help them see the flaws in their analysis and guide them to a stronger process. At every turn, Tara immediately zeroed in on exactly where each student was struggling and provided sophisticated advice to help her students improve. That ability would be invaluable on a small team of dedicated clerks working toward the same goal of producing high-caliber judicial writing. And, of course, her ability to see the logical flaws in legal arguments would prove invaluable when reviewing briefs submitted to the court.

In addition, Tara is a delight to work with. She brings a positive, productive attitude to every situation, no matter how challenging. And she shows the same respect for her co-law fellows and her students as she does for me, her professor. Her students were lucky to have her as a resource last year, and they knew it. I heard from them on many occasions how helpful Tara had been to them, not only in developing their research and writing skills, but also in adjusting to the difficult world that is the first year of law school.

The empathy that Tara’s students often described is not surprising. As the first in her family to go to law school, Tara takes nothing for granted. She does not feel (or act) entitled to any of the accolades and opportunities that have come her way, but rather embraces each one as a new way to expand her understanding of the legal field, improve her legal abilities, and open up new paths forward in her career. A judicial clerkship would be an extraordinary platform from which she could explore any number of potential avenues, and I know that she would have the greatest appreciation and respect for such an opportunity.

I would be happy to discuss her candidacy further at any time.

Sincerely,

Sara Kaiser Creighton
sara.creighton@georgetown.edu
(415) 519-5800

TARA S. MAHESH
tas164@georgetown.edu | 102 Bayani Street, Daly City, CA 94014 | (515) 509-0138

The attached writing sample is an opening brief I filed in a Fourth Circuit 28 U.S.C. § 2241 habeas appeal for the Georgetown Law Appellate Litigation Clinic. I collaborated with two other students on this brief but have only included the portions I was assigned to draft. During the editing process, I received endnote and margin feedback from my supervising attorney. The Table of Contents and Table of Authorities have been omitted in this submission to reduce the sample's length.

STATEMENT OF THE CASE

Mr. Timms, a person civilly committed as sexually dangerous pursuant to the Adam Walsh Act, 18 U.S.C. § 4248, appeals the dismissal of his pro se habeas petition. JA028, JA034–035. He claims that the Attorney General violated his due process rights by civilly detaining him without new § 4248 proceedings after he served two intervening criminal sentences and that his conditions of confinement are punitive in violation of the Due Process Clause. JA006–009.

Statement of Facts

Less than three weeks before Mr. Timms' scheduled October 2008 release from federal criminal custody at FCI Butner Medium I (Butner I) on a child pornography conviction, the government certified him for civil commitment pursuant to § 4248(a). JA068–072. The government's certificate stayed Mr. Timms' release pending the resolution of the civil commitment action against him. *See* 18 U.S.C. § 4248(a); JA075. The commitment action was then held in abeyance while the Supreme Court decided the constitutionality of 18 U.S.C. § 4248 in *United States v. Comstock*, 560 U.S. 126 (2010). *See Timms v. Johns*, 627 F.3d 525, 532 (4th Cir. 2010). Mr. Timms remained confined at Butner I pending the resolution of *Comstock*. *Id.* at 527–28.

Three years after his certification, Mr. Timms had an 18 U.S.C. § 4247(d) certification hearing. JA072, JA075. The district court held that the necessary conditions for commitment had been satisfied and remanded Mr. Timms to the custody of the Attorney General. JA083. The Attorney General continued to detain Mr. Timms at Butner I, where the federal government holds all people civilly

committed under § 4248 because it is the only facility that has the Bureau of Prison's Commitment and Treatment Program (CTP).[1] JA085.

Since Mr. Timms' original § 4248(a) certification almost fifteen years ago, the Attorney General has twice moved him out of and back into Butner I. Those moves are set forth in the following table and described in more detail below.

Estimated Dates[2]	Facility	Type of detention
10/08–10/12	Butner I	Detained in civil commitment facility pending § 4248(d) hearing after the BOP's § 4248(a) certification. *Timms v. Johns*, 627 F.3d 525, 527–28 (4th Cir. 2010); JA081–082.
10/12–after 10/16	Butner I	Civilly committed after district court's § 4248(d) finding. JA075–076, JA083, JA085, JA087.
After 10/16–08/17	Butner II	Served criminal sentence in Case No. 5:15-cr-00169. JA087, JA093, JA110.
08/17–11/19	Butner I	Confined in civil commitment facility. JA110, JA190.
11/19–02/20	Piedmont Reg. Jail	Pre-trial criminal detention in Case No. 5:19-cr-00428. JA190.
02/20–after 08/20	Butner II	Pre-trial detention and post-sentence confinement. JA190, JA204, JA213.
After 08/20–06/21	USP Marion	Served criminal sentence in Case No. 5:19-cr-00428. JA204, JA213, JA009, JA018.
07/21–present	Butner I	Confined in civil commitment facility. JA009, JA018, JA034–035.

While confined at Butner I in 2015, Mr. Timms was indicted on one count of possessing contraband in violation of 18 U.S.C. § 1791(a)(2). JA085, JA087, JA136. Mr. Timms allegedly possessed a tattoo gun and a colored marker with a 7/8-inch blade attached to the end, which he said was used to work on radios and headphones.

[1] *See* U.S. Dep't of Just., Fed. Prison Sys., *FY 2022 Performance Budget*, 42, https://www.justice.gov/jmd/page/file/1398306/download.
[2] These dates are derived from the available records. Some dates are approximate because the records are not clear about when the move happened.

JA147–148. After being found guilty at a bench trial in August 2016, Mr. Timms was sentenced to thirty months' incarceration and three years' supervised release. JA146, JA150–152.

At some point after October 2016, the government removed Mr. Timms from the civil commitment unit designated for § 4248 detainees and incarcerated him at FCI Butner Medium II (Butner II) to serve this sentence. JA087, JA093. Butner II is a penal prison for incarcerated individuals serving criminal sentences.[3] It does not detain civilly-committed people, and the Bureau of Prison's CTP is not available to those imprisoned at Butner II. *Id.*

Mr. Timms filed a pro se emergency motion with the civil commitment court to clarify whether his civil commitment continued during his criminal sentence. JA112. In November 2017, the civil commitment court rejected his motion, explaining that Mr. Timms could only be discharged from commitment upon a court order finding that he is no longer sexually dangerous to others through discharge proceedings initiated by (1) the BOP warden under § 4248(e), or (2) Mr. Timms' counsel under § 4247(h). JA115. And although habeas corpus was available to Mr. Timms, he had not "been granted a writ" ordering his release. *Id.*; 18 U.S.C. § 4247(g).

Mr. Timms was released from his thirty-month sentence on July 31, 2017. JA015. In August 2017, the government removed Mr. Timms from Butner II and immediately detained him in Butner I, the designated § 4248 unit. JA093, JA110. In May 2019, while confined at Butner I, Mr. Timms was indicted on two counts of

[3] *Compare* Fed. Corr. Inst. I Butner, N.C., *Inmate Handbook*, 6–7, https://www.bop.gov/locations/institutions/but/BUT_aohandbook.pdf, *with* Fed. Corr. Inst. II Butner, N.C., *Inmate Handbook*, 6–7, https://www.bop.gov/locations/institutions/btf/BTF_aohandbook.pdf.

possessing sharpened objects, which he asserted were for building vehicle replicas. JA177–178; *see United States v. Timms*, 844 F. App'x 658, 659 (4th Cir. 2021). Mr. Timms waived his right to a detention hearing and was remanded to the custody of the United States Marshals Service, which detained him at Piedmont Regional Jail in Farmville, Virginia. JA183. Mr. Timms was incarcerated with "sentenced and convicted state and federal inmates in an open dormitory style jail without any officer supervision." JA179–180.

On February 19, 2020, the government moved Mr. Timms from Piedmont Regional Jail to Butner II, a penal prison. JA190. In June 2020, after being found guilty at a jury trial of the two charges of possessing contraband in prison, Mr. Timms was sentenced to concurrent terms of thirty months' incarceration and three years' supervised release on each count. JA029, JA197. At some point after August 2020, the government transferred Mr. Timms from Butner II to USP Marion in Illinois to serve his sentence. JA204, JA213.

Upon Mr. Timms' return to Butner I in July 2021, he had access to "voluntary" participation in the CTP. JA009, JA018, JA013. Mr. Timms declined that treatment. JA017. He alleges that as a result, he has been confined in a separate unit with others who are not participating in the CTP. *Id.* They have been denied "privileges allowed to persons participating in treatment." *Id.* For instance, they are forced to wear uniforms even though treatment participants are not. *Id.* They are also separated from treatment participants and "essentially punished for refusing sex offender treatment." *Id.*

Procedural History

Mr. Timms filed a pro se 28 U.S.C. § 2241 habeas corpus petition in the Eastern District of North Carolina in July 2021 asserting two claims: (1) that the government's failure to file a § 4248(a) certification after each of his intervening criminal sentences renders his current civil detention a violation of the Due Process Clause; and (2) that his conditions of confinement as a civilly-committed person have been punitive in violation of the Due Process Clause. JA005–009. Because Mr. Timms was in quarantine and unable to access the law library when he filed his petition, JA009, he later filed a motion for leave to amend his petition pursuant to Fed. R. Civ. P. 15. JA013. The amended complaint provided additional detail about the claims in his petition.[4] JA014.

Before the government entered an appearance or responded to Mr. Timms' petition, the district court sua sponte entered a final judgment on March 11, 2022.[5] JA032–033. The district court granted Mr. Timms' motion for leave to amend and dismissed his first claim for failure to exhaust his remedies before the civil commitment court. JA031–032. It found that, although Mr. Timms sought relief from the civil commitment court after his 2017 criminal conviction, he neither appealed the denial of relief in that case nor sought relief after his 2020 conviction. JA031–032.

Alternatively, the district court dismissed Mr. Timms' claim "for the same reasons set forth" in his 2017 order denying Mr. Timms' pro se emergency motion in

[4] Mr. Timms raised two additional claims that are not included in this brief. JA017–025.

[5] The same district court judge both adjudicated Mr. Timms' civil commitment proceedings and dismissed Mr. Timms' habeas petition.

the civil commitment proceedings. JA031. In that earlier opinion, the civil commitment court dismissed Mr. Timms' claim because none of the § 4248 conditions of release were met: (1) "[t]he warden at F.C.I. Butner ha[d] not certified that Mr. Timms [was] no longer sexually dangerous," and (2) "the Court ha[d] not determined that Mr. Timms should be discharged on a motion filed by counsel." JA115. Nor had Mr. Timms "been granted a writ of habeas corpus." *Id.*

The district court also denied relief on the conditions of confinement claim, asserting that a habeas petition could not be used to challenge conditions of confinement. JA031–032. In the alternative, the district court determined that relief was not warranted. *Id.*

Mr. Timms timely filed a notice of appeal on March 24, 2022. JA034–035; Fed. R. App. P. 4(1)(B)(iii). This Court appointed undersigned counsel as amicus in support of Mr. Timms' position. It identified as an issue of particular interest whether Mr. Timms, as a civilly-committed person, "is required to exhaust constitutional claims in commitment proceeding[s] prior to filing [a] 28 U.S.C. § 2241 petition."

ARGUMENT

Mr. Timms challenges: (1) the Attorney General's authority to continue detaining him pursuant to 18 U.S.C. § 4248 without judicial authorization after he completed his intervening criminal sentences, and (2) his conditions of confinement. JA006–009. Because resolution of the first issue turns on the statutory civil commitment procedures, key provisions are described here.

The Attorney General or the Director of the Bureau of Prisons initiates civil commitment proceedings against a federal prisoner by filing, in the district where the

prisoner is confined, a certification that the person is a "sexually dangerous person" (SDP). 18 U.S.C. § 4248(a). A district court must then hold a commitment hearing, at which the government must show by clear and convincing evidence that the individual is an SDP. 18 U.S.C. § 4248(d). If the court determines that a person is an SDP, as it did with Mr. Timms, the statute requires that the Attorney General ask the state where the person was convicted or last domiciled to accept responsibility for the "custody, care, and treatment" of the person. *Id.* If the state does not accept that responsibility, "the Attorney General shall place the person for treatment in a suitable facility" for civil commitment. *Id.*

The civil commitment court can discharge a committed person either when the state agrees to accept responsibility for his custody, care, and treatment, or when the person establishes by a preponderance of the evidence that he is no longer sexually dangerous. 18 U.S.C. § 4248(d)–(e). Discharge proceedings may be initiated by the director of the facility in which the person is detained, or the committed person's legal counsel can initiate discharge proceedings by moving for a sexual dangerousness hearing. 18 U.S.C. §§ 4247(h), 4248(e). The statute specifies that it does not prevent a committed person "from establishing by writ of habeas corpus the illegality of his detention." 18 U.S.C. § 4247(g).

All issues in this appeal turn on questions of law that this Court reviews de novo. *See United States v. Antone*, 742 F.3d 151, 158 (4th Cir. 2014).

I. MR. TIMMS' PETITION STATED A PLAUSIBLE CLAIM THAT HIS TRANSFER TO CRIMINAL CONFINEMENT SEVERED HIS CIVIL COMMITMENT, AND THE DISTRICT COURT ERRED IN DISMISSING FOR FAILURE TO EXHAUST.

Mr. Timms has plausibly alleged that the Attorney General discharged his civil commitment order by twice removing him from civil commitment and placing him in

a penal prison. JA007–009. The district court erred in dismissing this claim for Mr. Timms' failure to exhaust remedies in his § 4248 civil commitment proceedings. JA030–031. No such remedies existed. It also erred in dismissing this claim because the Attorney General's failure to file a § 4248(a) certification seeking a new commitment hearing unconstitutionally deprived Mr. Timms of his liberty interest without due process. *Id.*; U.S. Const. amend. V. To hold otherwise would give the government unfettered discretion to move detainees between penal prisons and civil commitment without any judicial process, supplanting the court's role in deciding when individuals are subject to confinement. *See* U.S. Const. amend. V.

A. The District Court Erred in Denying Mr. Timms' Habeas Claim for Failure to Exhaust.

The district court failed to consider that only available remedies must be exhausted before bringing a habeas petition to challenge the illegality of detention. In this case, § 4248 does not provide a remedy. And even if this Court finds that Mr. Timms needed to exhaust, the district court erred in sua sponte dismissing on this ground because exhaustion is a non-jurisdictional claims-processing rule that must be raised as an affirmative defense.

1. Mr. Timms has no available remedies to exhaust.

Mr. Timms' habeas petition asserted that the government was required to begin new § 4248(a) certification proceedings each time he was put back in civil confinement after serving his criminal sentences. JA030. The district court, relying on *Timms v. Johns*, 627 F.3d 525, 533 (4th Cir. 2010), dismissed this claim because

Mr. Timms had not exhausted remedies in his § 4248 civil commitment proceedings.[6] JA030–031. The district court erred because 18 U.S.C. § 4248 provides no remedy for this claim.

Courts only require exhaustion of *available* remedies before habeas corpus relief can be granted. *See Stack v. Boyle*, 342 U.S. 1, 6–7 (1951); *see also Timms v. Johns*, 627 F.3d at 531. But a remedy is only available if it provides an avenue for relief. *See Ross v. Blake*, 578 U.S. 632, 643–44 (2016). Section 4248 does not provide a remedy for Mr. Timms' claim. He cannot raise his claim—that his current detention is unlawful because an intervening criminal sentence terminated his prior civil commitment—in discharge proceedings under § 4248(e) or § 4247(h) because the purpose of those hearings is to determine if he is sexually dangerous. In fact, the § 4248 civil commitment court rejected Mr. Timms' similar claim in 2017 on precisely these grounds. JA114–115. Because the discharge proceedings to determine sexual dangerousness do not provide a remedy, Mr. Timms has no available remedies under § 4248 and is entitled to pursue habeas relief under 28 U.S.C. § 2241.

Nor does *Timms v. Johns,* 627 F.3d at 532, say anything to the contrary. In that case, Mr. Timms' civil commitment proceedings had been held in abeyance while the Supreme Court decided the constitutionality of § 4248 in *United States v. Comstock*, 560 U.S. 126 (2010). *Timms*, 627 F.3d at 525–26, 532. Mr. Timms brought a habeas claim challenging both the court's failure to hold an evidentiary hearing on

[6] In 2017, the civil commitment court dismissed an emergency motion that Mr. Timms filed raising the substance of this claim. In ruling on his habeas claim, the district court said that Mr. Timms needed to have appealed this denial of relief to fully exhaust. But because he need not have raised this claim with the civil commitment court at all, his failure to appeal is irrelevant.

the issue of his sexual dangerousness and § 4248's constitutionality. *Id.* at 528. This Court held that Mr. Timms could have, but had not, challenged the abeyance order in the § 4248 civil commitment court. *Id.* at 532. Challenging that order would have allowed him to obtain the evidentiary hearing required by § 4248(a) to determine his sexual dangerousness. *Id.* And he could have raised his constitutional challenge to § 4248 as an affirmative defense to the commitment action brought by the government. *Id.* Because Mr. Timms had not availed himself of these § 4248 remedies, this Court held that he could not raise those claims in a habeas petition.

But the statute does not provide a remedy for Mr. Timms' claim in this case. Once civil commitment starts, the only relief contemplated by § 4248 is a court order finding that the committed person is no longer sexually dangerous or a writ of habeas corpus. JA114–115. Mr. Timms cannot raise his due process claim—that he was entitled to a new § 4248 determination—in discharge proceedings that are focused solely on his sexual dangerousness. 18 U.S.C. §§ 4247(h), 4248(e). Thus, his only option is to bring a habeas corpus petition challenging the illegality of his confinement. 18 U.S.C. § 4247(g).

2. Even if Mr. Timms is required to exhaust, the district court erred in sua sponte invoking exhaustion.

Regardless whether this Court finds that Mr. Timms should have exhausted this claim, the district court erred in sua sponte dismissing Mr. Timms' § 2241 petition for failure to exhaust. JA031–032. Section 2241's judicially-created exhaustion requirement is a non-jurisdictional claims-processing rule. *See Stewart v. Iancu*, 912 F.3d 693, 700 (4th Cir. 2019) (recognizing that procedural requirements are jurisdictional only if Congress clearly makes them so). Such a claims-processing

rule is an affirmative defense that cannot be invoked sua sponte by the district court, *see United States v. Muhammad*, 16 F.4th 126, 129 (4th Cir. 2021), unless the court provides "the parties fair notice and an opportunity to present their positions." *Day v. McDonough*, 547 U.S. 198, 210 (2006).

The district court sua sponte dismissed Mr. Timms' habeas petition for failure to exhaust before the government had even entered an appearance, let alone asserted an exhaustion defense. JA031–032. And it did so without giving Mr. Timms any notice. *Id.* This Court has repeatedly vacated such dismissals in light of *Muhammed*. *See, e.g.*, *United States v. Poyner*, No. 20-7156, 2021 WL 5412332, at *1 (4th Cir. Nov. 19, 2021) (vacating district court's order when government did not raise exhaustion); *see also United States v. Marshall*, No. 21-7554, 2022 WL 910664, at *1 (4th Cir. Mar. 29, 2022) (finding district court erred and remanding when government did not invoke threshold prerequisites to suit). It should do the same here.

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The attached writing sample is an appellate brief I submitted for my Legal Practice: Writing and Analysis course as part of my final exam. It was chosen as the best appellant brief from a class of 55 students. It is my independent work, without edits or feedback from anyone. The Table of Contents and Table of Authorities have been omitted in this submission to reduce the sample's length.

The appellate brief assignment entailed analyzing a fact pattern involving a criminal matter. Mr. Whitman was charged with sending two threatening emails in violation of federal law. He was subsequently found incompetent to stand trial and sent to a Bureau of Prisons medical facility pending competency. The government motioned to have Mr. Whitman involuntarily medicated to render him competent to stand trial. The district court granted the government's motion, and Mr. Whitman appealed the order to the U.S. Court of Appeals for the Ninth Circuit.

ISSUE STATEMENT

Whether the government can forcibly inject Richard Whitman with antipsychotic medication for the sole purpose of rendering him competent to stand trial, given that he sent two emails to an actor of a TV show he watches, has never harmed anyone, will likely be sentenced to time served if convicted, and a conviction will not prevent him from sending future emails.

STATEMENT OF THE CASE

Richard Whitman suffers from grandiose type delusional disorder, a rare mental disorder that subjects him to extreme delusions that he may hold for a month or so. J.A. 12. Patients with grandiose type often suffer from delusions where they believe they have a great talent, made a great discovery or are a prominent person. J.A. 12-13. In the eight years that Whitman has suffered from his mental illness, he has never committed a crime. J.A. 6. Whitman has only been hospitalized once. J.A. 16. During this episode, he yelled and threw objects at his mother. J.A. 18. His mother did not press charges and did not report any injuries. J.A. 18.

Whitman believes he is the reincarnation of Reverend Richard Bright, a character from the television show *The Eternal Order*. J.A. 3. In this show, Reverend Bright is a religious cult leader who has trapped members in a bunker. J.A. 3. Posing as Reverend Bright, Whitman sent two emails to Mr. Schmidt (Schmidt), an actor on *The Eternal Order*, on August 3 and 6, 2020. J.A. 4. The emails warned Schmidt of the dangers of Hell. J.A. 37. Whitman has never come into physical contact with Schmidt and only knows him from the TV show. J.A. 3-4.

On August 7, 2020, Schmidt complained to the police about these emails, leading to the arrest of Whitman. J.A. 4. The police search conducted after Whitman's arrest only

turned up a quart-sized bottle of household drain cleaner and a recording of an episode of *The Eternal Order* as evidence. J.A. 4.

On September 18, 2020, Whitman was charged with two counts of transmitting a threatening communication in interstate commerce in violation of 18 U.S.C. § 875(c). J.A. 4-5. The prosecution believes that ten to sixteen months is an appropriate sentence for Whitman's alleged crimes. J.A. 34.

For seven months now, Whitman has been detained at the Butner Federal Medical Center (BFMC). J.A. 4, 10. The government's expert witness testified that Whitman is not a danger to himself or others. J.A. 15. While in custody, Whitman told police officers that he was trying to "save Mr. Schmidt from Hell" and that he "did not intend to threaten him." J.A. 32.

On October 30, 2020, Whitman was adjudged incompetent to stand trial. J.A. 9. Whitman has refused to take the antipsychotic medication prescribed to him by the BFMC staff because he believes the medication is "poison." J.A. 9, 24. The government has moved to forcibly medicate him for the purpose of rendering him competent to stand trial. J.A. 9.

The government plans to forcibly medicate Whitman with Risperdal. J.A. 22. The government has provided the Herbel study and an expert in schizophrenia as evidence that Risperdal will successfully restore him to competency. J.A. 20-21. The government's expert testified it will take twenty weeks to restore Whitman to competency. J.A. 22.

On November 20, 2020, the District Court held a *Sell* hearing to determine whether the government could forcibly medicate Whitman. J.A. 8. On December 28, 2020, the government's motion to involuntarily medicate Whitman was granted. J.A. 53. Whitman now appeals on the first factor of the *Sell* test. J.A. 54.

SUMMARY OF THE ARGUMENT

The Supreme Court crafted a stringent balancing test to ensure that the government would only use forcible medication in the rarest of circumstances—this is not one of those

cases. *See Sell v. United States*, 539 U.S. 166, 167 (2003). The government seeks to forcibly inject Whitman with Risperdal. This invasion of his bodily autonomy is only permissible if they meet the rigorous requirements of the *Sell* test. The government has failed to meet this burden, so this Court must reverse.

In the eight years that Whitman has suffered from his mental illness, he has emailed one man with who he has never come into physical contact and only knows from a TV show. He has never harmed anyone and has not committed a single crime. Since *Sell*, a likely Sentencing Guidelines range of less than twenty-seven to thirty-three months has never been characterized as serious in the Ninth Circuit. Whitman's likely sentence range of ten to sixteen months is nowhere near this threshold. Two emails—less than 30 words—to a single person are not serious enough to warrant forcibly injecting Whitman with an antipsychotic drug.

In the eventuality that the medication renders Whitman fit for trial, he will have spent almost as much time in pretrial detention as the ten-to-sixteen-month sentence that he likely will receive. Furthermore, a conviction will not prevent Whitman from accessing his computer and household cleaners, the "weapons" that the government alleges Whitman used to harm others. These outcomes undercut the government's interest in prosecution to the point of insignificance.

The government is not concerned with Whitman's health or wellbeing. They have one goal—to restore Whitman to competence. If the District Court's order is affirmed based on the insufficient evidence the government has provided, it will put thousands of disabled defendants at risk of bodily intrusion. It will virtually guarantee that the government can always meet its burden in cases where it wishes to forcibly medicate a defendant with antipsychotics.

ARGUMENT

The *Sell* court found that defendants possess a Fifth Amendment liberty interest in avoiding the unwanted administration of antipsychotic drugs. 539 U.S. at 178; U.S. Const. amend. V. To forcibly medicate Whitman with Risperdal, the government must prove by clear and convincing evidence that: (1) it has an important governmental interest in prosecuting him by showing that (a) his alleged crimes are serious and that (b) no special circumstances undermine the importance of that interest. *Sell*, 593 U.S. at 180; *United States v. Onuoha*, 820 F.3d 1049, 1054 (9th Cir. 2016) (holding that the analysis of the first *Sell* factor is a two-step inquiry). The government fails to meet this burden and their case collapses upon a *de novo* review. *See United States v. Ruiz-Gaxiola*, 623 F.3d 684, 693 (9th Cir. 2010) (holding that the first *Sell* factor is a legal question that is *de novo* reviewed). This Court must protect Whitman's Fifth Amendment liberty interest and reverse the District Court's order.

I. THE GOVERNMENT HAS FAILED TO SHOW IT HAS IMPORTANT INTERESTS AT STAKE.

To forcibly medicate Whitman, the government must prove that his alleged crimes are sufficiently serious to establish an important governmental interest. *Sell*, 593 U.S. at 180. This Court weighs the defendant's likely Sentencing Guidelines range (likely SG range), criminal history, and the specific facts of their alleged crime to determine whether a crime is sufficiently serious. *See Onuoha*, 820 F.3d at 1054. Considering these three factors, the government has failed to show that Whitman's alleged crimes are sufficiently serious.

A. Whitman's unprecedentedly low likely SG range, lack of criminal history, and absence of threats against government officials support a finding that his crimes are not serious.

This Court has never held a crime carrying a likely SG range less than twenty-seven to thirty-three months as sufficiently serious to justify forcibly medicating a defendant. *See, e.g.*, *Onuoha*, 820 F.3d at 1055 (range of 27 months to 33 months); *United States v. Gillenwater*, 749 F.3d 1094, 1101 (9th Cir. 2014) (range of 33 months to 41 months); *Ruiz-Gaxiola*, 623 F.3d at 694 (range of 100 to 125 months); *United States v. Hernandez-Vasquez*,

513 F.3d 908, 911 (9th Cir. 2008) (range of 92 to 115 months). The likely SG range for Whitman's alleged crimes is ten to sixteen months, which is unprecedentedly low—less than half the range of any crime this Court has previously deemed serious. J.A. 16.

An alleged crime is sufficiently serious when a defendant has extensive criminal history. *See, e.g.*, *Ruiz-Gaxiola*, 623 F.3d at 694 (holding that the defendant's extensive criminal history supported an assessment that the alleged crimes were sufficiently serious). Whitman has never committed a crime, which weakens the claim that his alleged crime is serious. J.A. 10.

When a defendant has a low likely SG range and no criminal history, this Court has only found crimes that involve threatening the lives of government officials to be sufficiently serious. *See Onuoha*, 820 F.3d at 1055; *see also Gillenwater*, 749 F.3d at 1101 (holding that the defendant's emails stating that he would choke, rape, and kill government officials were sufficiently serious despite his low likely SG range). In *Onuoha*, the defendant's likely SG range was twenty-seven to thirty-three months—lower than any the Court had previously deemed serious—and he had no criminal history. Despite this, the Court found the defendant's crimes sufficiently serious because he made a telephonic bomb threat to government airport officials. 820 F.3d at 1055.

Similar to *Onuoha*, Whitman has an unprecedentedly low likely SG range and no criminal history. J.A. 17. However, unlike *Onuoha*, Whitman only sent two emails to Schmidt, an actor and private citizen, warning him about the dangers of Hell. J.A. 7. Whitman's actions do not rise to the type of crimes that this Court has held to be sufficiently serious based on the specific facts of the crime.

Whitman's unprecedentedly low likely SG range, lack of criminal history, and the absence of threats against government officials demonstrate that his alleged crimes are insufficiently serious to justify violating his bodily autonomy. The District Court erred in their finding, and this Court must reverse.

B. Special circumstances undermine the government's interest in prosecuting Whitman.

Even if this Court were to find Whitman's alleged crimes serious, special circumstances undermine the government's interest in prosecuting him. *See Sell*, 593 U.S. at 181 (finding a nonexhaustive list of special circumstances included pretrial confinement for a significant period of time and commitment to providing a fair trial); *see, e.g.*, *United States v. Brooks*, 750 F.3d 1090, 1097 (9th Cir. 2014) (finding that courts must consider whether a potential sentence is diminished by time served).

1. Whitman's remaining sentence after being adjusted for pretrial detention is insubstantial.

When a defendant's remaining sentence is insubstantial after being adjusted for pretrial detention, it weakens the government's interest in prosecution. *See Ruiz-Gaxiola*, 623 F.3d at 694. In *Al-Murisi*, the defendant spent sixteen months in pretrial detention, leaving an eleven-toseventeen-month sentence if convicted. The Court found that the remaining sentence was not substantial enough to establish a governmental interest in prosecution. *See United States v. Al-Murisi*, No. CR 11-00332 JSW, 2012 WL 5383279, at *5 (N.D. Cal. Nov. 1, 2012). Whitman has already spent seven months in pretrial detention, leaving a three-to-nine-month sentence if he is convicted. J.A. 9. This is half the already insubstantial adjusted sentence Al-Murisi faced. Furthermore, if medicated, tried, and potentially convicted, Whitman will have spent almost as much time in pretrial detention as the ten-to-sixteen-month sentence he would likely receive. J.A. 17. This significantly diminishes the government's interest in prosecuting him.

Although this Court found a governmental interest despite compelling time served in *Onuoha*, the same conclusion should not be automatically applied to Whitman as the facts of his case are significantly different. Unlike *Onuoha*, Whitman's alleged crimes do not involve making threats of violence related to national transportation infrastructure. Prosecuting

these threats was found to be an important enough interest to override the defendant's time served. *See Onuoha*, 820 F.3d at 1057.

2. A conviction will not deter Whitman from committing future crimes.

When a conviction will not deter a defendant from committing crimes in the future, it weakens the government's interest in prosecution. *Compare Onuoha*, 820 F.3d at 1057 (finding there was a government interest in prosecution because a conviction would deter the defendant from making future terrorist threats) *with United States v. White*, 620 F.3d 401, 414 (4th Cir. 2010) (finding that the government's interest in prosecution was weakened because a conviction would not deter the defendant from committing future crimes).

In *Gillenwater*, the government's expert witness testified that the defendant had the intent and ability to act on his threats to choke, rape, and kill government officials. 749 F.3d at 1102. While in custody, the defendant continued to send threats, demonstrating a potential to commit crimes in the future. *Id.* The *Gillenwater* court concluded that a conviction would deter the defendant from committing future crimes by subjecting them to supervised release and limiting their ability to own a firearm. *Id.* This gave the government an interest in prosecution. *Id.*

Unlike *Gillenwater*, the government's expert witness in the instant case testified that Whitman is not a danger to himself or others. J.A. 14. While in custody, Whitman told police officers that he was trying to "save Mr. Schmidt from Hell" and that he "did not intend to threaten him," indicating no potential to harm Schmidt in the future. J.A. 32. The government has presented no evidence to the contrary. J.A. 31. Even if this changes, convicting Whitman will not deter him from committing crimes in the future. The government has not presented any evidence that a conviction would subject Whitman to supervised release or limit his access to the means of his alleged crimes—a computer and a household cleaner. J.A. 29. This weakens the government's interest in prosecution.

Whitman's one-time hospitalization is not evidence that he is a danger to others. J.A. 10. In 2013, Whitman was hospitalized after suffering from delusions. J.A. 11. During this crisis, he yelled and threw objects at his mother. J.A. 12. His mother did not press charges and did not report any injuries. *Id.* In the eight years that Whitman has been suffering from his mental illness, he has had one such episode. *Id.* This Court should not conclude that Whitman is dangerous based on this isolated incident.

3. There is insufficient evidence of Risperdal's efficacy and forcibly medicating Whitman would undermine his right to a fair trial.

When there is insufficient evidence of a treatment's efficacy, forcibly medicating a defendant undermines their right to a fair trial. *See White*, 620 F.3d at 420-21. In *White*, the defendant suffered from delusional disorder, grandiose type. *Id.* The government provided the Herbel study, which included only one patient with delusional disorder grandiose type, along with an expert in schizophrenia as evidence that the proposed medication would successfully restore White to competency. *Id.* The *White* court held that this evidence was insufficient proof of efficacy and that forcibly medicating White undermined her right to a fair trial. *Id.*

Like *White*, Whitman suffers from delusional disorder grandiose type. J.A. 15. The government has provided the same Herbel study and an expert in schizophrenia as evidence that Risperdal will successfully restore him to competency. J.A. 16. This evidence is insufficient proof of Risperdal's efficacy and thus, forcibly medicating Whitman would undermine his right to a fair trial.

The substantial time Whitman has already served, the inability of a conviction to deter him from committing future crimes, and the infringement of his right to a fair trial diminish the government's interest in prosecuting him. The government has failed to meet its burden under the first prong of the *Sell* test, and this Court must intervene to protect Whitman's bodily autonomy.

CONCLUSION

For the foregoing reasons, the District Court's order granting the government's motion to forcibly medicate Whitman should be reversed.